TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 1[illegible]

IOWA CENTRAL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. M. BACON, ADMINISTRATOR OF THE ESTATE OF MARTIN W. MACFARLANE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED [illegible]

(16,000)

(23,596)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 130.

IOWA CENTRAL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

L. M. BACON, ADMINISTRATOR OF THE ESTATE OF MARTIN W. LOCKHART, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 9, 1914.

1 In the Supreme Court of Iowa, January, 1912, Term.

At Law.

L. M. BACON, Administrator, Appellee,
vs.
IOWA CENTRAL RAILWAY COMPANY, Appellant.

Appeal from Mahaska District Court.

Hon. Jno. F. Talbott, Judge.

ABSTRACT OF RECORD.

Shangle & Bolton, McCoy & McCoy, D. C. Waggoner, Attorneys for Appellee.
Geo. W. Seevers, W. H. Bremner, Jno. O. Malcolm, Attorneys for Appellant.

Due and legal service of the within abstract of the record is hereby accepted this — day of ——, 1911.

——— ———,
———— ———,
Attorneys for Appellee.

2 On the 20th day of September, 1905, the plaintiff caused to be served upon the defendant an

Original Notice,

as follows:

You are hereby notified, that on or before the 22nd day of September, 1905, a petition of L. M. Bacon, administrator of the estate of Martin W. Lockhart, deceased, will be filed in the office of the clerk of the District Court of the state of Iowa, in and for Mahaska county, claiming of you the sum of ten thousand dollars, on account of the wrongful death of plaintiff's intestate by being struck and run over by an engine on said road, said accident being caused by the negligence of defendant's servants and employes.

And unless you appear hereto and defend before noon of the second day of the October term, A. D. 1905, of said court, which will commence on the 3rd day of October, 1905, default will be entered against you and judgment rendered thereon as prayed for in said petition.

Thereafter, and on the 22d day of September, 1905, the plaintiff filed in the District Court of Mahaska county, Iowa, his

Petition,

as follows:

The plaintiff for cause of action states that he is the duly appointed administrator of Martin W. Lockhart, deceased, and that the defendant is a corporation organized under the laws of the state of Illinois and authorized to do business in this state; that said defendant is engaged in the operation of a railroad running through the city of Oskaloosa, Iowa, and across High avenue a street in said city.

Plaintiff further states that on or about the 17th day of April, 1905, one of the defendant's engines and tender manned by
3 an engineer, a fireman and a brakeman carelessly and negligently ran over the plaintiff's intestate on High avenue west while said intestate was walking on the sidewalk on the north side of said High avenue and inflicted injuries which caused his death in a short time; that said injury occurred in the day time and in the presence of a large number of persons and in the presence of the flagman maintained by the defendant at said crossing and that said flagman negligently permitted the plaintiff's intestate to go upon said track without warning him of his danger; that said engineer and fireman saw plaintiff's intestate upon said railway track or could have seen him and negligently permitted him to be run down by said engine and killed.

Plaintiff further states that plaintiff's intestate was almost wholly blind and the employees of defendant, to-wit: The engineer, the fireman, the brakeman and the flagman who were on duty on said engine and at said crossing at the time well knew said fact; that said engine was running at a slow rate of speed and could easily have been stopped before it struck plaintiff's intestate but plaintiff avers that the defendant's employes negligently and carelessly permitted the said Martin W. Lockhart to be killed to the plaintiff's damage in the sum of ten thousand dollars.

Wherefore, plaintiff demands judgment against the defendant in the sum of nineteen hundred and ninety dollars and for costs.

J. B. BOLTON,
Attorney for Plaintiff.

(Endorsed:) Filed Sept. 22, 1905. Cliff B. West, Clerk.

4 And thereafter, and on the 30th day of September, 1905, the defendant filed in said cause its

Answer,

as follows:

Comes now the Iowa Central Railway Company, defendant in the above entitled cause, and for answer states:

First. Admits that it is a corporation organized and existing under the laws of the state of Illinois and is engaged in the operation of a railroad running through the city of Oskaloosa, state of Iowa.

Second. Admits that the plaintiff's intestate, Martin W. Lockhart, was wholly blind.

Defendant further says that of no other allegation in plaintiff's petition contained has this defendant sufficient knowledge or information to form a belief, and it therefore denies specifically each allegation therein not herein specifically admitted and demands the proof.

Wherefore, defendant asks it may have judgment for costs.

And thereafter and on the 2d day of October, 1905, and within the time required by law, the defendant filed its

Petition for Removal

of said cause to the United States Circuit Court in and for the Southern District of Iowa, as follows:

Comes now the Iowa Central Railway Company, defendant in the above entitled cause of action and shows:

1st. That it is a corporation organized under the laws of the state of Illinois, and it is now and was at the commencement of this suit a resident and citizen of the state of Illinois, and a non-resident of the state of Iowa and not a citizen of the said state of Iowa.

5 2nd. That the plaintiff herein is now and was at the commencement of this suit a citizen and resident of the state of Iowa.

3rd. That the amount in controversy between the plaintiff and defendant in this suit, exclusive of interest and costs, exceeds the sum of two thousand ($2,000.00) dollars.

4th. That your petitioner at the time of filing this petition has filed therewith its bond with good and sufficient surety, as required by section 639 of the Revised Statutes of the United States, binding itself thereby that it will enter in the United States Circuit Court in and for Southern District of the State of Iowa on the first day of its next session copies of the process against it and all pleadings, depositions, testimony and other proceedings in said cause.

Wherefore, your petitioner prays that its said bond be accepted by this court and to order that no further proceeding in this cause shall be had in this court against your petitioner and that this action be removed to the United States Circuit Court in and for the Southern District of the State of Iowa.

GEO. W. SEEVERS,
JOHN I. DILLIE,
Attorneys for Defendant.

STATE OF MINNESOTA,
Hennepin County, ss:

I, Geo. W. Seevers, being first duly sworn, on oath say that I am the General Counsel of the defendant Iowa Central Railway Company in the foregoing entitled cause; that as such I have charge of this litigation; that I have read the foregoing petition and know the contents thereof and that the facts therein stated are true as

6 I verily believe; that I am well informed as to said facts as to the petitioner named therein.

GEO. W. SEEVERS.

Subscribed in my presence and sworn to before me by the said George W. Seevers, this 29th day of September, 1905.

[NOTARY SEAL.] W. H. WALL,
Notary Public, Hennepin Co., Minn.

My commission expires Nov. 24, 1911.

(Endorsed:) Filed Oct. 2, 1905. Cliff B. West, Clerk.

And on the same day, to-wit, the 2d day of October, 1905, the defendant duly filed, as required by law, its

Bond for Costs,

as follows:

In the District Court of Iowa in and for Mahaska County.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased, Plaintiff,

vs.

IOWA CENTRAL RAILWAY COMPANY, Defendant.

Bond for Costs.

Whereas, Iowa Central Railway Company, defendant, in the above entitled cause, is about to file its petition therein for the removal of said cause to the United States Circuit Court in and for the Southern District of the State of Iowa,

Now, therefore, know all men that we, Iowa Central Railway Company, as principal and W. H. Kalbach as surety, are
7 held and firmly bound unto the said L. M. Bacon, administrator of the estate of Martin W. Lockhart, deceased, plaintiff in said cause, in the penal sum of five hundred ($500.00) dollars lawful money of the United States.

Now if the said Iowa Central Railway Company shall enter and file in said Circuit Court on the first day of the next session thereof, copies of the process against it in said cause and of all pleadings, depositions, testimony and other proceedings in said cause concerning or effecting the said Iowa Central Railway Company, and shall appear in said Circuit Court at the time aforesaid and enter special bail in said cause, if the same shall require and shall do such other appropriate acts as by the statutes of the United States are required in that behalf upon the removal of causes from the State Court into the said United States Court, then this obligation to be void; otherwise to remain in full force.

Dated this 2nd day of October, 1905.

IOWA CENTRAL RAILWAY COMPANY,
Principal,

By GEO. W. SEEVERS,
General Counsel;
W. H. KALBACH, *Surety.*

STATE OF IOWA,
Mahaska County, ss:

I, W. H. Kalbach, being first duly sworn, depose and say I am surety on the foregoing bond; that I am a resident of the state of Iowa; that I am worth the sum of $500.00 beyond the amount of my debts and I have property liable to execution in the state of Iowa equal to the sum of $1,000.00.

W. H. KALBACH.

8 Subscribed in my presence and sworn to before me by the said W. H. Kalbach this 2nd day of October, 1905.

[NOTARIAL SEAL.] HARRY H. ROSEBROOK,
Notary Public.

Approved this 2nd day of October, 1905.

[SEAL DISTRICT COURT.] CLIFF B. WEST,
Clerk of District Court.
By W. T. MARTIN, *Deputy.*

(Endorsed:) Filed Oct. 2nd, 1905. Cliff B. West, Clerk.

And thereafter and on the 29th day of March, 1906, the clerk of said District Court of Iowa, in and for Mahaska county, duly filed in the office of the clerk of the Circuit Court of the United States in and for the Southern District of Iowa, a transcript of the proceedings in said cause in the District Court of Mahaska county, including copies of the petition, original notice, answer, bond for costs and petition for removal, which transcript was duly certified by the clerk of said District Court of Iowa, in and for Mahaska county, the signature of said clerk being duly attested by the Judge of said District Court, all as hereinafter more fully appears.

After the filing of the said transcript in the Federal Court, this cause was dropped from the docket in the District Court of Iowa, in and for Mahaska county, but on September 19, 1910, the same reappeared upon the docket in said Mahaska County District Court, as on that date the plaintiff filed in the office of the clerk of Mahaska County District Court an

9 *Amended and Substituted Petition,*

as follows:

Plaintiff states: That he hereby renews all the allegations in the original petition the same as if set out and repeated herein and alleges that the deceased was going west at the crossing of the Iowa Central Railway on West High street, Oskaloosa, Iowa; that he was walking along the sidewalk on the north side of said street; that he came down town from the west nearly every day and crossed on the same crossing; that as he was going west an engine passed south and he at once started to cross the street; this engine immediately reversed and came back at a rapid rate about the time the deceased got

about midway of the crossing; that this is one of the most public crossings upon the public streets in the city of Oskaloosa, business houses both east and west of this crossing, and there being a constant stream of travel across said crossing at all times of the day and there is also an immense amount of switching and railway travel across said street, the switch yards and tracks of the defendant being both north and south of this crossing and engines and cars running over the said crossing almost constantly and because of these conditions great caution is required and should be exercised by the train men operating trains and engines across the said crossing; that the engineer and fireman were negligent in not looking, and if they had looked they might have avoided the accident; the said engineer and fireman were negligent in running at a high and dangerous rate of speed over said crossing at the time of the accident and the said engineer and fireman were also negligent in not sounding an alarm by blowing the whistle or ringing the bell while running over said crossing and approaching the same and had they done so the acci-
10 dent might have been avoided; that the deceased was proceeding in the exercise of due caution and the said accident was not caused by any negligence or want of care upon his part contributing to said injury but the said injury was caused solely by the negligence and want of care upon the part of the defendant and its agents and employees as above set forth and because of said negligence the engine ran over the said Martin Lockhart and caused his death; that said injury resulting in the death of said Lockhart occurred on or about the 17th day of April, 1905; that plaintiff's intestate at the time was an old man over sixty years old; that he was not blind, but his sight was impaired and he required no one to assist him to go around; that he crossed this crossing nearly every day for more than a year before the said accident; the plaintiff withdraws the statement in his original petition that "plaintiff's intestate was almost wholly blind" and corrects the same as heretofore set out herein; that the defendant was further guilty of negligence in that the watchman employed by it at the said crossing should have seen the deceased in time to have prevented the accident; that had said watchman been properly performing his duties he would have stopped plaintiff's intestate from crossing at the time; that this negligence and want of care on the part of the defendant's watchman in not warning the plaintiff's intestate that the engine had reversed and started back and that said engine was coming back was one of the causes that occasioned the said accident and the resulting injury and death of plaintiff's intestate; that the defendant through its agents and employees carelessly and negligently permitted and caused plaintiff's intestate to be run over and killed by its engine to plaintiff's damage in the sum of 1990 dollars which is now
11 due and wholly unpaid. Wherefore, plaintiff prays for judgment against the defendant for the sum of $1,990.00 and costs.

And on the 6th day of October, 1910, the court made the following

Order.

Now on this day this cause came on for hearing on motion and application of defendant for removal of cause to the United States Circuit Court and said motion and application having been heard by the court and the court being fully advised in the premises, finds that the amount in controversy is less than $2,000.00, exclusive of interest and costs and therefore said motion and application are overruled and defendant excepts.

Defendant is given ten days to plead.

And thereafter and on the 15th day of October, 1910, the defendant filed its

Answer,

as follows:

Now comes the defendant, the Iowa Central Railway Co., and in answer to the amended and substituted petition of the plaintiff, filed herein, states that it denies each and every allegation in said amended and substituted petition.

The said defendant for further and separate answer to the said amended and substituted petition, states that whatever damages or injuries the said decedent sustained by reason of the alleged acts of the defendant, the same were due to his own negligence, directly contributing thereto for which this defendant is not liable.

The said defendant for a further and separate answer to the said amended and substituted petition of the plaintiff filed herein,
12 states that the alleged cause or causes of action set out in the amended and substituted petition are barred by the statute of limitations, more than two years having elapsed since the said acts, charged in said amended and substituted petition are alleged to have been committed by the said defendant and the defendant pleads the statute of limitations as a full and complete defense to the said plaintiff's action as set out in the said amended and substituted petition.

Wherefore, by reason of the premises as are above set forth, the said defendant asks that the plaintiff's cause of action may be dismissed upon its merits and it have judgment against the plaintiff for its costs.

On the 6th day of December, 1910, the plaintiff filed an amendment to the petition to which the defendant duly filed an answer, and thereafter and on the 18th day of February, 1911, the plaintiff filed another amendment to the petition.

And thereafter and on the 20th day of February, 1911, the plaintiff filed an

Amended and Substituted Petition,

as follows:

Comes now the plaintiff herein, leave of court having been first obtained, and files this his amended and substituted petition:

Plaintiff for cause of action states: That he is the duly appointed administrator of the estate of Martin W. Lockhart, deceased. That the defendant is a corporation organized under the laws of the state of Illinois and authorized to do business in the state of Iowa,
13 and that said defendant is engaged in the operation of a railroad through the city of Oskaloosa, Iowa, and across High avenue, a street in said city.

That High avenue is one of the paved streets of the city of Oskaloosa; that where the said railway crosses said High avenue, the defendant has five tracks, which with the spaces within said tracks cover and occupy the whole of Kossuth street running north and south at this point. That High avenue is paved and has cement sidewalks occupying the said street up to the intersection on both sides of the railway, and that the defendant maintains a permanent crossing at said intersection for the benefit of the public. That High avenue is the most public thoroughfare in the city of Oskaloosa and it is the main and central crossing for the people of the city and of the country lying southwest, west, north and northwest of said point, that hundreds of teams and foot passengers pass and re-pass there daily, and because of these conditions, great caution is required and should be exercised by the trainmen operating engines across the said crossing.

That on or about the 17th day of April, 1905, the plaintiff's intestate was walking to the west along the north sidewalk on High avenue west, and as he approached the defendant's tracks at the said intersection of Kossuth street and High avenue, one of defendant's engines and tender passed over the north sidewalk crossing going south, and after said engine had passed to the south over the crossing, this plaintiff's intestate then proceeded to cross the said tracks, proceeding with due care and caution, and when he had passed over the main line of said tracks and had got about midway of the second track, defendant's employees without giving any warning by sound of whistle or ringing of the bell suddenly started said engine
14 to the north, and carelessly and negligently struck plaintiff's intestate, knocking him down and running over him with said engine, causing his death.

That plaintiff's intestate did not know that said engine was going to run back to the north, that defendant's employees on starting said engine back towards the north and across this crossing, did not ring the bell, made no outcry and did nothing to apprise him that said engine was approaching. That said employees, knowing the publicity of said crossing and the danger to pedestrians and others at this point, were careless and negligent in backing the said engine without looking or paying any attention whatever to what they were doing, and that they negligently and without regard for this plaintiff's intestate's rights or his safety, backed said engine upon him

and over him, causing his death; that if the said employees, whose duty it was to operate said engine, had been using ordinary care they could have seen and it was their duty to have seen the danger of deceased; that they carelessly and negligently failed to give any attntion to what they were doing or to where they were going and could have easily stopped said engine before the injury occurred had they been using ordinary care in the manner of operating said engine. That after they should have known and it was their duty to have known of deceased's danger, they carelessly and negligently backed said engine over plaintiff's intestate, causing his death. That defendant's employees in charge of said engine at the said time, saw plaintiff's intestate and knew of the fact that he was in peril, or might have known of said fact, after they saw him by the use of ordinary care, and thereafter failed to use ordinary care to stop and prevent the said injury sustained by plaintiff's intestate, the
15 duty of defendant's employees operating said engine required them to stop whenever danger was threatened to plaintiff's intestate, whether he was on the track, near to it, or approaching it. That defendant's employees negligently failed to see deceased's danger which in the use of ordinary care they might have seen in time to have avoided said injuries and death; that in the use of ordinary care they might have so seen his danger, they might and should have given him warning and might and should have stopped said engine before it struck and run over him; that defendant's employees after they might have so seen his dangerous position, negligently failed to give this plaintiff's intestate any warning and neglected to stop said engine before it so run over him and negligently failed to save him from harm which they might have done by the use of ordinary care.

That the defendant company maintained a flagman at this crossing whose duty it was to warn pedestrains, and those driving teams across said crossing of the approach of trains and engines and of danger in crossing said crossing. That on the day of the said injuries in question the defendant company had a flagman at this point, that said flagman saw, or should have seen, this plaintiff's intestate approaching the crossing and negligently failed to give him any warning, knowing and seeing his danger, or could have seen his danger, and it being the flagman's duty to see his danger, negligently failed to give him any warning, and negligently permitted him to go upon said crossing without giving him any warning.

That defendant was further guilty of negligence in this by violating and disobeying Ordinance Number 76 of the ordinances of the city of Oskaloosa, Iowa, said ordinance providing that said company should maintain proper gates at said crossing for the safety
16 of the traveling public using said crossing, and defendant did not provide or maintain any gates as provided by said ordinance, a copy of which is hereto attached and marked Exhibit "A" and made a part of this petition.

That defendant was further guilty of gross negligence in immediately reversing its engine and running said engine back over the said crossing without giving time for persons who had started to

cross said crossing after the engine had passed to the south over said crossing, and in not giving time for this plaintiff's intestate to have crossed said crossing after said engine had passed over same to the south, that the defendant's employees operating said engine were negligent in reversing said engine and starting same back to the north without giving time for this plaintiff's intestate to cross over said crossing, and to start said engine back without giving any warning to him or ringing the bell and that the watchman or flagman was negligent in not properly warning him of the approach of said engine.

That defendant, well knowing the public use of said crossing, and well knowing of the many people who continually used said crossing, was guilty of gross negligence in backing said engine over said crossing, without having a switchman, brakeman, look-out or other person to look out for persons about to cross or crossing said track, to warn them of danger and to keep the trainmen advised as to the situation, so that the engine might be stopped or so run as to avoid injury to pedestrains, this plaintiff's intestate and others. That defendant was negligent in having no switchman, brakeman, look-out or other person on the rear of said engine as same backed over said crossing, as provided by its rules, in this regard and for the safety of those using said crossing, the defendant well knowing
17 the publicity of said crossing and the danger to pedestrains and others at said point.

That plaintiff's intestate was proceeding in the exercise of due care and caution and was wholly without fault at the time of the said injuries and in no way contributed thereto. That said injuries and death *was* caused solely by the negligence and want of care upon the part of the defendant and its agents and employees as above set forth, and because of said negligence as above set forth, said injuries resulted, causing the death of this plaintiff's intestate.

That plaintiff's intestate at the time of the said injuries was a man around sixty years of age, and his eyesight was slightly impaired, but not to such an extent that he was not able to get around without assistance; that he had used this crossing nearly every day in going to and from town for the year before his death; that in using said crossing he did so with due care and caution and was so using the same at the time of his injuries and death. And that his income, pension and earnings, at said time were around ($500.00) five hundred dollars a year.

That defendant, through its agents and employees, carelessly and negligently permitted and caused plaintiff's intestate to be run over and killed by said engine, and that by reason of the premises and the said negligent acts of the said defendant, this plaintiff was injured and damaged in the sum of $1,990.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of $1,990.00 and for costs.

18 EXHIBIT "A."

Ordinance No. 76.

An Ordinance Providing for the Public Safety and Convenience at Railway Crossings.

Be it ordered by the City Council of the city of Oskaloosa.

SEC. 1. That the Iowa Central Railway Company is hereby required to erect and maintain gates at the intersection of their road with West High avenue in the city of Oskaloosa. Said gates to be constructed and in operation on both intersections within thirty days after the passage of this ordinance, and after the passage of this ordinance the city clerk shall cause notice of the same and a copy of the ordinance to be served on the agent of said Iowa Central Railway Company in Oskaloosa, Iowa.

SEC. 2. Said gates shall be constructed so as to constitute when closed a complete barrier across the entire street to the passage of persons or teams upon or across said intersections and it shall be the duty of said company to keep the gates at its road at the places specified in this ordinance closed at all times when any cars or engines are passing said street upon its road.

SEC. 3. It shall be the duty of said railroad to keep said gates open to the free passage of persons and teams except when trains or the engines are passing the said street, said gates shall be opened immediately after the passage of each train or detached engine or car or cars, and provided, further, that only one train shall be permitted to pass at any one closing of the gates.

SEC. 4. That said company failing or neglecting to erect, maintain, or operate said gates as provided in this ordinance or failing to comply with any of the provisions of this ordinance shall
19 be deemed guilty of misdemeanor and for each offense shall be fined not to exceed twenty dollars and each day of the continued neglect or violation of this ordinance shall be deemed a separate offense.

And thereafter and on the 28th day of February, 1911, the defendant filed its

Motion to Dismiss and to Strike

as follows:

Now comes the defendant, Iowa Central Railway Company, and moves the court to dismiss the plaintiff's alleged cause of action and strike from the files of this court, the pleadings of the plaintiff filed in this cause since the 1st day of September, 1905, and marked filed Sept. 19, 1910, Dec. 6, 1910, Feb. 18, 1911, and Feb. 20, 1911, and assigns the following grounds therefor:

First, that defendant on the 2nd day of October, 1905, and prior to filing any plea therein, filed its petition and bond for removal of same to the Federal Court at Des Moines, Iowa, both properly exe-

cuted and same was transferred to said court, properly docketed therein and on the 11th day of May, 1909, said cause was dismissed by said Federal Court for want of prosecution.

Second, that all pleadings filed in this cause have been so filed since said removal and docketing and order of dismissal as aforesaid in the Federal Court and are amendments to or amended and substituted petitions in said cause to and for the original petition or the various amended and substituted petitions so filed and this court was and is without authority to permit such pleadings to be filed and is without jurisdiction or authority to hear and determine
20 said cause thereon for the reason the jurisdiction to hear and determine said cause had passed to the Federal Court and could only be again vested in this court by the Federal Court remanding the same to it, which was not done, or by plaintiff dismissing the same and bringing an original action to this court, which was not done.

In support of said motion, the defendant attaches hereto a certified copy of the records in said cause in the Federal Court and marks the same Exhibit "A" and makes same a part of this motion.

Third, the defendant subject to its ruling upon the motion to strike the plaintiff's pleadings from the files and dismiss said cause of action, further moves the court to require the plaintiff to select upon which petition and amendment thereto, if any, or its so-called amended and substituted petition, said cause is to be tried and to identify the same by the date or dates of the filing of the same in the clerk's office of this court, for the reason that said plaintiff has filed three separate amendments and three separate so-called amended and substituted petitions.

Fourth, for the further reason that the defendant, nor the court can determine upon which one of the said pleadings the case is to be tried, without compelling said plaintiff to make his election, before said trial begins.

Filed Feb. 28, 1911.

EXHIBIT A.

The petition, original notice, answer, bond for costs and petition for removal which formed a part of Exhibit A, attached to the motion and which are referred to in the following certificate of Cliff B. West, clerk of the District Court, and which are also referred to in the certificate of William C. McArthur, clerk of the
21 Circuit Court of the United States for the Southern District of Iowa, which certificates form a part of Exhibit A, are identical with the petition, answer, original notice, petition for removal and bond for costs heretofore set out in this abstract.

The balance of Exhibit A is as follows:

STATE OF IOWA,
Mahaska County, ss:

I, Cliff B. West, Clerk of the District Court in and for said County, in the state aforesaid, do hereby certify the foregoing to be a true, perfect and complete copy of the petition, original notice, answer, bond for costs and petition for removal filed in the above entitled cause, as the same appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Oskaloosa, Iowa, this 20th day of December, A. D. 1905.

[SEAL.] (S'g'd) CLIFF B. WEST, *Clerk,*
By L. E. CORLETT, *Deputy.*

STATE OF IOWA,
Mahaska County, ss:

I, W. G. Clements, Judge of the District Court, do hereby certify that Cliff B. West, whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of signing and sealing the same, clerk of the District Court of Mahaska County aforesaid, and keeper of the records and seal thereof, duly elected and qualified to office; that full faith and credit are, and of right ought to be given to all his official acts as such, in all courts of record and elsewhere, and this his said attestation is in due form of law, and by the proper officer.

22 Given under my hand this 20th day of December, A. D. 1905.

(S'g'd) W. G. CLEMENTS,
Judge of the Sixth Judicial District of Iowa.

STATE OF IOWA,
Mahaska County, ss:

I, Cliff B. West, Clerk of the District Court, in and for said County, in the State aforesaid, do hereby certify that W. G. Clements, whose genuine signature appeared to the foregoing certificate, was at the time of signing the same Judge of the District Court of the Sixth Judicial District of Iowa, duly commissioned and qualified, that full faith and credit are, and of right ought to be given to all his official acts as such, in all courts of record and elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Oskaloosa, Iowa, this 20th day of December, A. D. 1905.

[SEAL.] (S'g'd) CLIFF B. WEST, *Clerk,*
By L. E. CORLETT, *Deputy,*

(Endorsed:) Filed Mar. 29, 1906, E. R. Mason, Clerk.

In the Circuit Court of the United States for the Southern District of Iowa, General Division.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased, Plaintiff,
vs.
IOWA CENTRAL RAILWAY COMPANY, Defendant.

23 *Answer.*

Comes now the defendant and for answer to plaintiff's petition, denies each and every allegation therein contained.

For second and additional answer defendant says, that the accident mentioned in the petition and all of the injuries, if any, sustained by the plaintiff's intestate, were caused by and resulted from his failure to exercise due, proper and ordinary care for his own safety, and that the negligence of the plaintiff and his failure to exercise due, proper and ordinary care for his own safety contributed to and caused the accident and injuries alleged in the petition.

Wherefore, the defendant asks judgment for costs.

(S'g'd) GEORGE W. SEEVERS,
(S'g'd) JOHN I. DILLE,
Attorneys for Defendant.

(Endorsed:) Filed Mar. 29, 1906, E. R. Mason, Clerk.

And thereafter, to-wit: On May 9th, A. D. 1906, an order of continuance was ordered in said cause in words and figures following, to-wit:

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,
vs.
IOWA CENTRAL RAILWAY CO.

24 It is hereby ordered that this cause be continued generally.
(Recorded.)
(Recorded T. Page 218.)
(S'g'd) SMITH McPHERSON, *Judge.*

And thereafter, to-wit: On Dec. 5, 1906, an order of continuance was ordered in said cause in words and figures following, to-wit:

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,
vs.
IOWA CENTRAL RAILWAY COMPANY.

It is hereby ordered that this cause be continued generally.
(Recorded.)
Record U. Page 29.
(S'g'd) SMITH McPHERSON, *Judge.*

And thereafter, to-wit, on May 29, 1907, an order of continuance was ordered in said cause in words and figures following, to-wit:

25 In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,
vs.
IOWA CENTRAL RAILWAY COMPANY.

It is hereby ordered that this cause be continued generally.
(S'g'd) SMITH McPHERSON, *Judge.*

And thereafter, to-wit, on Dec. 5, 1907, an order of continuance was ordered in said cause in words and figures following, to-wit:

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,
vs.
IOWA CENTRAL RAILWAY COMPANY.

It is hereby ordered that this cause be continued generally.
(S'g'd) SMITH McPHERSON, *Judge.*

26 And thereafter, to-wit: On May 28, 1908, an order of continuance was ordered in said cause in words and figures following, to-wit:

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,

vs.

IOWA CENTRAL RAILWAY COMPANY.

It is hereby ordered that this cause be continued generally.

(S'g'd) SMITH McPHERSON, *Judge.*

And thereafter, to-wit: On Dec. 5, A. D. 1908, an order to notice for trial at next term or show cause why should not be dismissed was issued in said cause in words and figures following, to-wit:

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,

vs.

IOWA CENTRAL RAILWAY COMPANY.

This cause having this day been called and there being
27 no response from either side, and the same having been pending in this court for more than three years without any action by either party except to have the same continued.

It is now ordered that unless the same be noticed for trial at the next term of this court or good reason shown for not so doing that the same shall be dismissed for want of prosecution.

It is further ordered that a certified copy of this order be mailed by the clerk to the last known address of the attorneys for the parties to this cause.

(S'g'd) SMITH McPHERSON, *Judge.*

And thereafter, to-wit: On May 11, 1909, an order of dismissal was ordered in said cause in words and figures following to-wit:

In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,

vs.

IOWA CENTRAL RAILWAY COMPANY.

This cause came on this day for hearing, the defendant appeared by John I. Dille and plaintiff not appearing, the same was dismissed

at plaintiff's costs for want of prosecution. Thereupon it was
28 ordered that the defendant go hence without day and recover its costs taxed at — dollars and that execution issue therefor.

(S'g'd) SMITH McPHERSON, *Judge.*

UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

I, Wm. C. McArthur, Clerk of the Circuit Court of the United States for the Southern District of Iowa, hereby certify the above and foregoing to be a true, full and complete copy of the pleadings and record entries in the case of L. M. Bacon, administrator of the estate of Martin W. Lockhart, deceased, plaintiff, vs. Iowa Central Railway Company, defendant, No. 3747-Law, Central Division, in words and figures as follows, to-wit: Petition at Law; answer; original notice; petition for removal; bond for costs; certificate as to transcript from state Court; answer; order of continuance dated May 9, 1906; order of continuance dated Dec. 5, 1906; order of continuance dated May 29, 1907; order of continuance dated Dec. 5, 1907; order of continuance dated May 28, 1908; order to notice for trial at next term or show cause why should not be dismissed dated Dec. 5, 1908; order of dismissal dated May 11, 1909; as true, full and complete as the originals thereof filed and of record in my office in the city of Des Moines.

In witness whereof, I hereunto set my hand and affix the seal of said court at my office in the city of Des Moines in said District this 25th day of February, A. D. 1911.

[SEAL.] WM. C. McARTHUR,
Clerk of said Court.

29 And thereafter, and on the 3d day of March, 1911, the said motion to dismiss coming on to be heard, the following proceedings were had:

Plaintiff's Evidence.

C. E. CORLETT, called on behalf of the plaintiff testified as follows:

I am the clerk of the District Court in Mahaska county. I have before me district court record No. 29.

Q. You may now turn to the record in that book in the case of L. M. Bacon, administrator of the estate of Martin Lockhart, deceased, vs. Iowa Central Railway Company, at the October term, 1905.

A. This is at the October term, 1910.

Q. Is that the first record that appears in that case?

A. Yes, sir; I think it is.

Q. Have you examined the records of your office to see whether or not there is any other record?

A. I have had the deputy examine it.

Q. Where does this record appear?

A. It appears on October 6th, 1910.
Q. What book and what page of the book?
A. Page 588, book 29
Q. You may read that record?

Objected as immaterial, irrelevant and incompetent, the entry having been made more than four years after the case had been removed to the Federal Court, at Des Moines, Iowa, and when there was no such case pending in this court.

COURT: You say there is no other record?
A. Yes, sir; the deputy has searched the records and could find no other record.

30 COURT: You may read the record.
Defendant excepts.

"L. M. Bacon, administrator of the estate of Martin Lockhart, vs. Iowa Central Railway Company. No. 3144.

Now on this date, this cause came on for hearing on the motion and application of the defendant for removal to the United States Circuit Court, and the motion having been heard by the court and the court being fully advised in the premises finds that the amount in controversy is less than two thousand dollars, exclusive of interest and costs and said motion and application is overruled and the defendant excepts.

Defendant is given ten days to plead."

I do not find any other record of any character with reference to these parties to this action. The appearance docket shows that in October, 1910, a paper was filed marked answer. This paper was signed W. H. Bremner and John O. Malcolm, attorneys for defendant, and Geo. W. Seevers, general counsel. On December 17th, 1910, there was an answer filed signed by the same parties as attorneys for the defendant. There is an entry under date of December 7, 1910, in the same record as it appears at page 668, giving the defendant ten days to plead. There is no record showing any order made for removal. Exhibit A is a petition at law and is entitled L. M. Bacon, administrator, vs. Iowa Central Railway Company, filed September, 1905. I presume it is the original petition in this case. It was filed in this case.

Plaintiff offers in evidence Exhibit A, Robinson.

Objected to as immaterial and irrelevant. Overruled and the defendant excepts.

Plaintiff also offers the entries in Record Book 29, pages 588 and 668.

31 Objected to by the defendant as immaterial and irrelevant; that under the pleadings filed by the defendant, the case was removed to the Federal Court and any holding by this court that it was improperly removed would have no binding force or effect upon the defendant and for the further reason that the record discloses that this case was transferred to the Federal Court, by petition properly filed and by bond filed and that the Federal Court took jurisdiction of the case in October, 1905, and has never been remanded to this court.

Admitted subject to the objection.

Cross-examination:

I do not know whether the case of Bacon v. Iowa Central to which these entries refer was removed to the Federal Court in October, 1905. I remember of certifying the case. It was certified on the 20th day of December, 1905, and filed by E. R. Mason, clerk, on March 29, 1906. The fees for the certificate and transcript were paid by the defendant company. December 19th, 1905. This case appears on the docket down to the October, 1905, term, at the time the petition for the removal of the case was filed. It next appears on the docket in September, 1910, when an amended and substituted petition was filed. I do not think the case was on my docket in the meantime for trial. To my recollection it did not appear on our printed dockets. Sometime in the last few months it was put back by Mr. Wagner who filed some of the papers. It never came back by being remanded. I have no record showing that it was ever sent back to this court. I would have a record of it if it had been and there is no such record

32 Redirect:

The transcript which I prepared contains all of the pleadings filed, the original notice, the petition for removal, the bond and order of removal. I certified to the clerk of the Federal Court the petition at law, the original notice and the return thereon, the answer, the petition for removal, the bond for costs and the certificate of the clerk and the judge. I did not have any order for removal in the transcript. So far as I have been able to find, I did not have any order for removal of record or any other way. I do not think the court made any order of removal.

Testimony upon motion closed.

And thereafter and on the 4th day of March, 1911, the court duly entered of record the following

Order.

Now on this day this cause came on for hearing on defendant's motion to dismiss and strike and the court being fully advised in the premises said motion of defendant to dismiss and strike is overruled and defendant excepts. It is conceded by all parties that this cause shall stand for trial on the substituted petition, filed by plaintiff on February 20, 1911. Defendant is given until Monday, March 6th, to plead.

And thereafter and on the 7th day of March, 1911, the plaintiff filed its

Amendment to Petition,

as follows:

Comes now the plaintiff and amends his amendment to petition filed February 20th, 1911, and strikes out the word "substi-
33 tuted" appearing therein. That it was the intention of plaintiff that said amendment should be an amendment to the

original petition filed in this case and not a substituted petition. That in compliance with defendant's motion to require plaintiff to elect upon which pleadings he relies plaintiff states that he relies upon the original petition filed in this case as amended by the amendment to petition filed February 20th, 1911, and that plaintiff will go to trial upon the said original petition and the said amendment of date of February 20th, 1911; as herein amended.

And on the 6th day of March, 1911, the defendant filed its

Answer to Amended and Substituted Petition

as follows:

Now comes the defendant, the Iowa Central Railway Company, and in answer to the amended and substituted petition of the plaintiff, filed Feb. 20th, 1911, states that it denies each and every allegation in said amended and substituted petition.

That the said defendant for further and separate answer to the said amended and substituted petition, states that whatever damages or injuries the said decedent sustained by reason of the alleged acts of the defendant, the same were due to his own negligence, directly contributing thereto for which this defendant is not liable.

The defendant for a further and separate answer to the said amended and substituted petition of the plaintiff filed February 20th, 1911, states that the alleged cause or causes of action set out
34–79 in the amended and substituted petition are barred by the statute of limitations, more than two years having elapsed since the said acts, charged in said amended and substituted petition, are alleged to have been committed by the defendant, or the appointment of plaintiff as administrator of said decedent, and the bringing of this action, and the defendant pleads the statute of limitations as a full and complete defense to the said plaintiff's action as set out in the said amended and substituted petition.

Wherefore, by reason of the premises as are above set forth, the said defendant asks that the plaintiff's cause of action may be dismissed upon its merits and it to have judgment against the plaintiff for its costs.

And on the 9th day of March, 1911, the plaintiff filed his

Reply

as follows:

Now comes the plaintiff and for reply to the answer and amendments thereto heretofore filed alleges that he denies each and every allegation contained in said answer and amendments thereto, not admitted as set out in the petition and amendments thereto and plaintiff demands judgment as in the original petition.

Bill of Exceptions.

And on the 6th day of March, 1911, this cause came on to be heard, and a jury being duly empaneled, the following proceedings were had:

80 * * * * * * *

It is agreed that Martin Lockhart was 68 years of age at the time of his death, and that his expectancy of life as shown by the table in the Code Supplement, page 316 was 8.753 years.

Testimony closed.

After argument of counsel the court gave to the jury the following

Instructions:

I.

Plaintiff brings this suit as administrator of the estate of Martin W. Lockhart, deceased, to recover from the defendant the sum of $1,990.00 damages caused by the death of said Martin W. Lockhart and for cause of action states in his original petition and amendments thereto that he is the duly appointed and qualified administrator of the said Martin W. Lockhart, deceased, that the defendant is a corporation organized under the laws of the state of Illinois and authorized to do business in this state and that defendant is
81 engaged in operating a railroad line through the city of Oskaloosa, Iowa, and across High avenue, a street in said city; that on or about the 17th of April, 1905, one of the defendant's engines and tender, manned by an engineer, fireman and brakeman, carelessly and negligently ran over plaintiff's intestate, on High avenue, west, while said intestate was walking on the sidewalk on the north side of said High avenue, inflicting injuries, which caused his death in a short time; that said injury occurred in the day time and in the presence of a large number of persons and in the presence of a flagman, maintained by the defendant at said crossing; that said flagman negligently permitted plaintiff's intestate to go upon said track without warning him of his danger; that said engineer and the firemen saw plaintiff's intestate upon said railway track, or could have seen him and negligently permitted him to be run over and killed by said engine; that plaintiff's intestate was almost wholly blind, and that the employees of the defendant, to-wit, the engineer, the fireman, the brakeman and the flagman, who were on duty on said engine and at said crossing, at the time, well knew said fact; that said engine was running at a slow rate of speed and could easily have been stopped before it struck plaintiff's intestate and plaintiff avers that defendant's employees negligently and carelessly permitted said Martin W. Lockhart to be killed, to the plaintiff's damage in the sum of $10,000.00.

That High avenue is one of the paved streets of the city of Oskaloosa and that where said railway crosses said High avenue, the de-

fendant has five tracks, which with the spaces between said tracks cover and occupy the whole of Kossuth street, running north
82 and south at this point; that High avenue has cement sidewalks on said street on the intersection, on both sides and that the defendant maintains a permanent crossing at said intersection for the benefit of the public. That High avenue is the most public thoroughfare in the city of Oskaloosa and is the central crossing for the people of the city and of the country, lying west, southwest, north and northwest of said point and that hundreds of teams and foot passengers pass and repass there, daily.

That about the 17th of April, 1905, plaintiff's intestate was walking west along the north side of High avenue west, on the sidewalk, approaching the defendant's track at said intersection of Kossuth street and High avenue, when one of the defendant's engines and tenders passed from the north side of said walk and crossing, going south and that when said engine had passed south over the crossing the plaintiff's intestate proceeded to cross said track and had passed over the main line of said tracks and was about midway of the second track when defendant's employees started said engine to the north and carelessly and negligently struck plaintiff's intestate, knocking him down and running over him with said engine, causing his death.

That the defendant's employees started said engine backwards and to the north and across the crossing negligently and without regard to the plaintiff's intestate's rights or safety and backed said engine upon and over him, causing his death and could easily have stopped said engine before said injury occurred, had they been using ordinary care.

That defendant's employees in charge of said engine at said time saw plaintiff's intestate and knew the fact that he was in
83 peril and thereafter failed to use ordinary care to stop and to prevent said injury sustained by plaintiff's intestate; that the duty of the defendant's employees required them to stop whenever danger threatened the plaintiff's intestate, whether he was on the track, near to or approaching it.

That the defendant company maintained a flagman at this crossing whose duty it was to warn pedestrians and those driving teams across said street of the approach of trains and of engines and of danger in crossing said crossing; that on the day of said injury the defendant had a flagman at said point and that said flagman saw plaintiff's intestate approaching said crossing and failed to give him any warning when he saw his danger but negligently permitted him to go upon said crossing without giving him any warning.

That said injuries and death *was* caused by the negligence and want of care upon the part of the defendant and its agents and employees as above set forth.

That plaintiff's intestate at the time of said injuries was a man around sixty years of age; that his eye sight was slightly impaired but not to such an extent but that he was able to get around without assistance; that he had used this crossing nearly every day in going to and from town for the year before his death; that his income, pension and earnings at said time were around $500.00 a year.

That by reason of said premises and the said negligent acts of the defendant, the plaintiff has been damaged in the sum of $1,990.00.

Wherefore, he prays judgment against the defendant in the sum of $1,990.00 and costs.

84 The defendant by answer and amendment admits that it is a corporation, organized and existing under the laws of the state of Illinois and engaged in operating a railway running through the city of Oskaloosa, state of Iowa. Admits that the plaintiff's intestate, Martin W. Lockhart, was wholly blind but specifically denies each and every allegation in plaintiff's petition and amendments and demands that plaintiff's action be dismissed upon its merits and that *he* have judgment against the plaintiff for costs.

All other allegations of facts and issues presented by the pleadings, are by the court withdrawn from your consideration.

No. 2.

Under the issues thus presented by these pleadings the burden of proof is upon the plaintiff, and before you can return a verdict for the plaintiff, he must establish by a preponderance of the evidence:

First. That defendant was guilty of negligence in some one or more of the particulars charged in his petition, as set out in instruction No. 1 hereof, and that said negligence caused the alleged injury and death of plaintiff's intestate, Martin W. Lockhart.

Second. That defendant, through its employees, actually knew that plaintiff's intestate, Martin W. Lockhart, was in peril, in time to have avoided injuring him, by the exercise of reasonable care, and failed to avoid the injury.

It is not sufficient for the plaintiff to show that defendant's negligence caused the injury and death of Martin W. Lockhart, but he must further show by a preponderance of the evidence that the defendant had knowledge of the danger said Martin W. Lock-

85 hart was in for a sufficient length of time before the injury was inflicted, so that by the exercise of reasonable care on the part of defendant's employees the injury might have been avoided.

If he has established by a preponderance of the evidence these facts, that is; that defendant was guilty of negligence which caused the injury and death of said Martin W. Lockhart, and that defendant had actual knowledge of said Martin W. Lockhart's peril, in time to have avoided injuring him by the exercise of reasonable care and failed so to do, you should find for the plaintiff; but if he has failed to show by a preponderance of the evidence that defendant was guilty of negligence which caused the injury and death of said Martin W. Lockhart, or failed to show, by a preponderance of the evidence that defendant had actual knowledge of said Martin W. Lockhart's peril in time to have avoided injuring him by the exercise of reasonable care, you should find for the defendant.

No. 3.

By the term, "a preponderance of the evidence," as used in these instructions, is meant evidence of greater weight, or evidence more satisfactory and convincing in its character.

No. 4.

Negligence is defined to be the doing of something which a reasonably prudent person would not do under the same or like circumstances, or the omission to do something which such a reasonably prudent person would not under the same or like circumstances omit to do.

No. 5.

86 The issue of contributory negligence on the part of plaintiff's intestate having been withdrawn from the jury, you are instructed that you need not consider or determine whether or not plaintiff's intestate, Martin W. Lockhart, was guilty of negligence, or failure to exercise ordinary care, in going upon the railway crossing and placing himself in the situation in which he was at the time of the alleged injury. For, notwithstanding he may have been negligent up to the instant of the accident, if the defendant had actually discovered his peril and appreciated, or ought to have appreciated the danger, and by the exercise of ordinary care could have avoided the injury, the defendant is liable and your verdict should be for the plaintiff. But unless you find from a preponderance of the evidence that defendant did have actual knowledge of deceased's peril in time to avoid the injury by the exercise of reasonable care, your verdict should be for the defendant.

No. 6.

You are instructed, that in determining whether defendant's employees had actual knowledge of deceased's peril in time, by the exercise of reasonable care to have avoided the alleged injury, and as bearing upon this question of actual knowledge, you should consider the situation of deceased and also the situation of the engineer, fireman and flagman, and the things done and said by them, as shown by the evidence, at and about the time of the alleged injury; and all the circumstances and conditions surrounding the transaction and persons connected therewith at and about the time of the alleged injury, as shown by the evidence, should be considered by you, as bearing upon this question.

87 No. 7.

You are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight you should take into consideration the conduct, appearance and demeanor of the witnesses while testifying; his apparent candor, or want of it; his bias and feeling or the absence of it; his interest or lack of interest in the result of the trial; his relationship, or non-relationship to those who are thus interested; his means of knowledge of the things about which he has testified; the reasonableness or unreasonableness of the story told and from these and all

other facts and circumstances, disclosed by the evidence, as surrounding the witness or his testimony, in the light of your own good common sense and knowledge of men and things, give to the testimony of each witness such weight and credit as you believe it fairly entitled to, and no more.

No. 8.

If under the evidence and instructions of the court, you find for the plaintiff, you will then proceed to determine from the evidence and assess the amount of his recovery, and the measure of such recovery, if any, will be the present worth or value of the estate which the said Martin W. Lockhart would reasonably be expected to have saved and accumulated if he had lived out the natural term of his life.

The measure of recovery in cases of this kind is not the sum which placed at interest will yield an amount equal to the income of deceased at the time of his death, nor the amount necessary for his support, but it is that amount estimated at its present
88 worth, which under all the circumstances disclosed in the evidence, you believe would have come to his estate at the end of his natural life.

In estimating such damage, if any, you award plaintiff, you should consider, so far as shown by the evidence, the age of said Martin W. Lockhart at the time of his death, his income from the pension or otherwise at the time of his death; his bodily health; his habits of thrift, or otherwise, if any have been shown; the contingencies of life, such as ill health, advancing years and consequent increase or decrease of expense of living, and all the facts and circumstances in evidence, tending to show the amount, if any, that the estate might have accumulated had he lived out his natural life, and award the plaintiff such sum as you believe, from the evidence, under the rules herein stated, will be a fair and reasonable compensation for loss sustained by the estate of said Martin W. Lockart, as a result of his death, not to exceed the sum claimed, $1990.00.

No. 9.

If you find for the plaintiff you are instructed that in arriving at your verdict, it will not be proper for you to agree that you will abide by a verdict obtained by each of you setting down the amount he may consider the plaintiff entitled to, and then add the several amounts together and divide by twelve and return the result as your verdict.

Such a verdict would be known as a quotient verdict and would not be permitted to stand under the law.

No. 10.

If you find for the plaintiff the form of your verdict will be "we, the jury, find for the plaintiff and assess the amount of his
89 recovery at $..... (inserting the amount). If you find for the defendant you will say "We, the jury, find for the defendant."

Two forms of verdict are hereto attached. When you have agreed you will cause the verdict agreed upon to be detached, and if you verdict is for plaintiff, after filling in the amount, you will caus the verdict to be signed by one of your number as foreman, and re turned with these instructions into court.

JNO. F. TALBOTT, *Judge.*

And thereafter and on the 11th day of March, 1911, the jur returned the following

Verdict.

"We, the jury find for the plaintiff and assess the amount of hi recovery at eight hundred fifty ($850.00) dollars."

And thereafter and on the 13th day of March, 1911, the defend ant filed its

Motion for a New Trial

in words and figures, as follows:

The defendant moves the court for a new trial in this cause an to set aside the verdict and judgment and for new trial thereof an in arrest of said judgment and assigns the following grounds there for:

First. Said verdict is contrary to law.

Second. The verdict is not sustained by sufficient evidence and i against the greater weight thereof.

Third. The verdict is not supported by any legal evidenc
90 in that the pension certificate introduced in evidence is no sufficient to show that the plaintiff's intestate would or coul have saved anything over and above said pension, after paying th expense of his living and proper care and support and that sai certificate and the pension received thereunder of itself, determine that the amount named therein is required for the proper care an support of said decedent and is not intended that any portion thereo should go to the estate of said decedent and is evidence that th whole thereof was necessary for his support.

Fourth. That the damages assessed by said verdict are excessive and that the only evidence to support the same is the pension certifi cate, showing that decedent was receiving at the time of his death the sum of fifty dollars ($50.00) per month. The uncontradicted evidence shows that said decedent was almost wholly blind, sixty eight years of age and was incapable of earning any money or tak ing care of business.

Fifth. That the entire income of said decedent from all source was the said pension of $50.00 per month and that all the same wa necessary for the proper care and support of said decedent and that his expectancy at the age of sixty-eight years was eight and three fourths years.

Sixth. The court erred in excluding from the consideration of the jury all evidence as to the negligence of the intestate contribut

ing to the injury, causing his death and withdrawing from the consideration of the jury the negligence of said intestate directly contributing thereto.

Seventh. The court erred in its statement of the issues to the jury in instruction No. 1 by omitting therefrom the defense of the limitation of the statute pleaded by the defendant as a full
91 and complete defense to said action and in withdrawing from the consideration of the jury the issue of the statute of limitations as thus pleaded and the further defense of contributory negligence pleaded which contributory negligence defendant alleged in its answer caused the injury or at least contributed directly to the injury for which this action is brought.

Eighth. That the court erred in giving upon its own motion instructions in chief Nos. 2, 5, 6 and 8.

Ninth. The court erred in giving instruction No. 2 in stating to the jury that plaintiff could recover damages against the defendant, notwithstanding the negligence of the plaintiff's intestate directly contributing thereto and in omitting and failing to instruct the jury that if, at the time of the accident and injury to the plainiff's intestate, both he and the defendant were negligent and that such joint negligence caused the injuries complained of, that the same would be concurrent and the defendant would not be liable to the plaintiff's intestate therefor.

Tenth. The court erred in the admission of evidence, duly objected to by the defendant and in the exclusion of evidence offered by the defendant all of which is fully shown by the shorthand reporter's notes, which were, by order of the court, made a part of the record in this cause.

The defendant further moves the court to arrest the judgment in this cause and assigns the following grounds therefor:

First. The court erred in holding that plaintiff's cause of action was not barred by the statute of limitations in this, more than two years elapsed from the bringing of the action and the filing by plaintiff of his first amended and substituted petition, September 28, 1910.

a. The original petition, filed September 22nd, 1905, in
92 said cause, failed to state a cause of action against the defendant in this, it omitted to allege intestate's freedom from contributory negligence to the injury complained of.

b. The second amended and substituted petition was filed February 20th, 1911, and set up new causes of action all of which were barred by the statute of limitations, more than two years having elapsed since the bringing of said action and the filing of the original petition, September 22, 1905, and February 20, 1911; that said original petition was superseded by the filing of the first amended and substituted petition September 28, 1910, and it was superseded by the second amended and substituted petition, filed February 20, 1911, and that said amended and substituted petitions, so filed more than two years after the bringing of said action and the filing of said original petition, would not relate back to, nor incorporate into them or either of them the original petition, so as to make the same a part thereof and the statute of limitations fully applied to both of

the said amended and substituted petitions and to the acts of negligence charged therein.

Second. That the court erred in holding that plaintiff's alleged causes of action, as set out in said amended and substituted petitions, were not wholly barred by the statute of limitations and further erred in holding that said original petition was a part of the pleadings in said cause, notwithstanding the filing of the alleged amended and substituted petitions.

Third. The court further erred in permitting any allegations made in the original petition to become a part of the amended and substituted petition as the alleged causes of action set out
93 therein were barred by the statute of limitations and the original cause of action superseded and abandoned by the filing of the amended and substituted petitions.

Fourth. The court erred in holding that it had jurisdiction of the parties and subject matter of this suit, the same having been transferred to the Circuit Court of the United States at Des Moines, Iowa, and was never remanded back to this court for trial.

And thereafter and on the 10th day of March, 1911,

Judgment

was duly entered of record in favor of the plaintiff and against the defendant in the sum of $850.00 and costs to which the defendant, at the time, duly excepted.

And thereafter and on the 7th day of April, 1911, the court entered and filed for record an order denying said motion for a new trial, to which ruling of the court the defendant, at the time, duly excepted.

Judge's Certificate.

At the trial of said action all of the proceedings, including the proceedings on the hearing on the motion of defendant to dismiss and to strike were duly taken down in shorthand by the official shorthand reporter of said court, and the said shorthand notes of said reported were duly certified to by him and by the trial judge, which certificate was to the effect that the said shorthand report is the report of the evidence in said action and contains, with the records,
94 exhibits and documentary evidence therein referred to and identified, all of the evidence offered, given or introduced in said action by the respective parties upon the trial thereof, all objections and motions of the parties thereto or any part thereof, all rulings by the court upon such objections and motions and all exceptions to such rulings and said report, with the certificate was ordered to be filed and made a part of the record and to constitute the bill of exceptions in this action, and the said shorthand notes so certified, were within the time required by law — with the clerk of said district court.

And thereafter the said official shorthand reporter made a transcript of his said notes duly certified to by him to be correct, which said transcript was on the 17th day of January, 1911, filed with the clerk of said district court.

Appeal.

On the 12th day of June, 1911, the defendant perfected its appeal to this court from the judgment of the said district court, as aforesaid, by serving a written notice of appeal on the attorneys for the plaintiff and upon the clerk of the district court in and for Dallas county, which said notice of appeal was filed in the office of said clerk on the 26th day of May, 1911, and securing to said clerk his fees for a transcript.

Attorney's Certificate.

The foregoing abstract of record contains all of the pleadings, and papers filed in said cause; all of the evidence introduced upon the trial thereof; all of the evidence offered; all objections made thereto, together with the rulings of the court thereon and the ex-
95–113 ceptions thereto, and is a full, true and complete record of all proceedings had in said case.

W. H. BREMNER,
JNO. O. MALCOLM,
Attorneys for Appellant.

GEO. W. SEEVERS,
Of Counsel.

I hereby certify that the cost of printing the foregoing abstract is $73.50.

W. H. BREMNER,
Attorney for Appellant.

* * * * * * *

114 In the Supreme Court of Iowa.

(Filed Oct. 22, 1912.)

28514.

L. M. Bacon, Administrator, Appellee,
vs.
Iowa Central Railway Company, Appellant.

Appeal from the District Court of Mahaska County.

John F. Talbott, Judge.

Action for damages resulted in judgment against the defendant, from which it appeals.

George W. Seevers, W. H. Bremner, and John O. Malcolm for Appellant.

John McCoy, L. T. Shangle, J. B. Bolton and D. C. Waggoner, for Appellee.

LADD, *J.*:

This action was begun September 20, 1905, by the service of an original notice, in which the claim was said to be $10,000. In the petition, filed two days later, plaintiff alleged that "the defendant's employés negligently and carelessly permitted the said Martin W. Lockhart to be killed, to the plaintiff's damage in the sum of $10,000," but demanded judgment for $1,990.00 only. The defendant filed and answer on September 30, 1905, admitting its corporate existence and that the plaintiff's intestate was blind, and denying all other allegations of the petition. It filed a petition for removal to the circuit court of the United States February 2, following, therein averring diverse citizenship and that the amount in controversy, exclusive of all interest and costs, exceeded $2,000; and also a bond approved by the clerk of the district court of Mahaska county. This petition was not presented to the district court, nor, so far as appears, was its attention directed thereto, prior to October 6, 1910. Notwithstanding this the clerk of the district court made out and certified a transcript of the papers on file and proceedings, which was filed in the circuit court of the United States March 29, 1906. The record does not indicate that plaintiff ever appeared in that court, but several orders continuing the cause were
115 entered of record, and on December 5, 1908, an order "that unless same be noticed for trial at the next term of this court, or good reason shown for not so doing, the same shall be dismissed for want of prosecution." At the May, 1909 term of that court the cause was so dismissed at plaintiff's costs. In the meantime the case had not been placed on the printed docket of the district court of Mahaska county, but after the dismissal in the Federal court, and on September 19, 1910, an amended and substituted petition was filed, in which the judgment prayed was the same as in the original petition, and on October 6 following the petition for removal was overruled. Nine days later the defendant filed an answer thereto denying the allegations of the amended and substituted petition and pleading contributory negligence and the statute of limitations. Later a second amended and substituted petition, with prayer as before stated, was filed, and defendant moved that the cause of action be dismissed and the two petitions last filed by plaintiff stricken from the files, on the ground that said cause had been transferred to the federal court and there dismissed. This motion was overruled and trial thereafter was had on the merits.

I.

The point first made is that the amount in controversy exceeded two thousand dollars, and for this reason the court erred in overruling the petition for removal to the federal court. While conceding

that the prayer was for a judgment of less than two thousand dollars, it is argued that inasmuch as the petition alleged the damages to be $10,000 it, rather than the prayer, should control, relying on Section 3775 of the Code, which declares that "The relief granted to plaintiff if there be no answer, cannot exceed that which he has demanded in his petition; in any other case the court may grant him any relief consistent with the case made by the petition and embraced within the issues." It may be conceded that there are authorities which seem to hold that under like statute the prayer for relief becomes wholly immaterial after an answer has been filed. See

Marquat vs. Marquat, 12 N. Y. 336.
1 Bates' Pleading, etc., 315.

An examination of these cases, however, discloses that the reasoning in each is broader that the decision. Thus, in Marquat vs. Marquat, the action was for the specific performance of an agree-
116 ment to execute a mortgage, to secure a note, and for other relief. The defendants answered denying any agreement to execute a mortgage, but alleging that the plaintiff merely loaned them money. The court denied specific performance, but entered judgment for the amount due on the note. Other decisions are to the effect that the prayer for relief forms no part of the petition, and hence that its sufficiency and character must be determined from the facts stated rather than from the prayer for relief.

Henry v. McKittrick, 42 Kansas, 485.
Tiffin Glass Co., vs. Stoehr, 54 Ohio St., 157.

In actions like this the damages are unliquidated and a prayed for judgment in a sum less than the damages alleged is equivalent to a remittance or waiver of the difference. Dillon in his work on Removal of Causes, Sec. 93 says: "The value of the matter in dispute, for the purpose of removal, is to be determined by reference to the amount claimed in the declaration, petition or bill of complaint." Of course this will not control when the allegations of the petition disclose the amount in controversy to be less than that for which judgment is prayed.

1 Ency. Pl. & Pr. 712.
Garman vs. Harvid, 141 U. S. 206.

And the sum for which judgment is prayed *id* determinative of the amount in controversy with reference to the right of appeal.

Hiatt vs. Nelson, 100 Iowa, 750;
Nash vs. Beckman, 86 Iowa, 249;
Cooper vs. Dillon, 56 Iowa, 367.

"In all actions sounding in damages the plaintiff is limited to his demand therefor in his declaration or complaint, and can recover no more than the amount specified."

5 Ency. Pl. & Pr. 712.

Our statute requires the petition to contain "a demand of the relief to which the plaintiff considers himself entitled, and if for money, the amount thereof," and the rule prevails in this state under the statute first quoted that the court may not grant relief other than that prayed unless included therein, or enter judgment or decree different from, unless equivalent to, that demanded.

Bottorff vs. Lewis, 121 Iowa, 27;
Brown vs. Kiel, 117 Iowa, 316;
Rees vs. Shepherdson, 95 Iowa, 431;
Marder vs. Wright, 70 Iowa, 42;
117 Tice vs. Derby, 59 Iowa, 312;
Lafever vs. Stone, 55 Iowa, 49;
O'Connell vs. Cotter, 44 Iowa, 48.

See also,

Winney vs. Sandwich Mfg. Co., 86 Iowa, 608;
Johnson vs. Rider, 84 Iowa, 50;
Humphrey vs. Dagg, 1 Greene, 435.

Following these decisions we necessarily reach the conclusion that the amount in controversy was less than $2,000, the amount for which judgment was prayed, notwithstanding the allegation in the petition that the plaintiff had been damaged more than that sum.

As precisely in point see,

Stark vs. Port Blakely Milling Co., 44 Wash., 309; 87 Pac., 339.
Smith vs. Railway Co., 4 N. D., 33; 53 N. W., 173.
Lake Erie & W. Ry. Co. vs. Juday, 16 Ind. Appl., 436; N. E. 843.

II.

The amount in controversy then affirmatively appeared, from the pleading on file, to be less than $2,000.00, though the petition for removal asserted it to exceed that sum, and under the Act of Congress approved March 3, 1875, as amended by the Acts of Congress approved March 3 and August 13, 1887, the cause was not removable. Sec. 3 of the Act referred to provides: "That whenever any party entitled to remove any suit mentioned in the next preceeding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from the state court to the Circuit Court of the United States, he may make and file a petition in such suit in such state court * * * for a removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond with good and sufficient surety * * * It shall then be the duty of the said court to accept such petition and bond and proceed no further in such suit; and the said copy being entered as aforesaid in said Circuit Court of the United States, the case shall then proceed in the same manner as if it had been originally commenced in said Circuit Court."

The defendant filed a petition for removal, accompanied by a bond with the Clerk of the District Court, but does not appear to have directed the court's attention thereto, nor to have afforded it an opportunity to "accept the petition, It caused
118 transcript of the record to be filed in the Federal Court which however, never ruled on the question of whether it acquired jurisdiction. It merely entered orders continuing the case, and finally dismissed the same without ruling thereon, or on the merits.

Continuance orders were not inconsistent with the want of jurisdiction, for this simply postponed action of any kind touching the disposition of the case. Nor was the dismissal a bar to the prosecution of another action.

Gardner v. Michigan Cent. R. Co., 100 U. S. 349; 37 L. Ed., 1107.

It is not important then to consider the effect to be given to a judgment on its merits rendered in a Federal Court in a case removable thereto, but see

Des Moines Navigation Co. vs. Homestead, 123 U. S., 552, 559, and

Chesapeake & O. Ry. Co. vs. McCabe, 203 U. S., 207; 53 L. Ed., 765,

holding that such a judgment if unreversed, will support a plea in bar.

There was no adjudication of the right of removal by the United States Circuit court, and unless the cause was removable the District Court of Mahaska County was not required to yield jurisdiction upon the filing of the petition for removal. Of course, the record as made by the filing of such petition cannot be questioned in the state court, but if as thus made, it appears upon its face that the cause was not removable, it was not only the privilege, but the duty of the state court to retain jurisdiction, and to adjudicate the issues raised by the pleadings. In other words, the petition for removal, with the record as it appeared upon the filing thereof, presented a pure question of law as to whether removal had thereby been effected.

In Burlington, Cedar Rapids & Northern R. Co. versus Dunn, 122 U. S. 513, 30 L. Ed., 1159, Chief Justice White, speaking for the court observed that "The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then to the state court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time,
119 that the petitioner is entitled to a removal of the suit. That question the state court has the right to decide for itself; and if it errs in keeping the case and the highest court of the state affirms its decision this court has jurisdiction to correct the error, consider-

ing for that purpose only the part of the record which ends with the petition for removal."

That court has repeatedly recognized the principle above stated, i. e. that the state court is not required to let go its jurisdiction until a case is mad*e* which, upon its face shows that the petitioner can remove the cause as a matter of right.

Pa. Co. vs. Bender, 148 U. S., 255; 37 L. Ed. 441;
Delaware R. Const. Co. vs. Meyer, 100 U. S. 457, 474; 25 L. Ed., 593, 599;
Powers vs. Chesapeake & O. R. Co., 169 U. S., 92; 42 L. Ed. 672.
Stone vs. South Carolina, 117 U. S., 430; 29 L. Ed., 962;
Yulee vs. Vose, 99 U. S., 545; 25 L. Ed., 356;
Nat'l Docks and N. J. Junct. Connect. Ry. Co. vs. Pa. R. Co., 28 At. 71.

The rule is well stated in Gregory vs. Hartley, 113 U. S., 746; 28 L. Ed., 1150: "The district court was not bound to surrender its jurisdiction until a case was made, which on the face of the record showed that the petitioners were in law, entitled to a removal. The mere filing of a petition was not enough unless, when taken with the rest of the record, it showed on its face that the petitioners had under the statute a right to take the case to another tribunal."

So that, notwithstanding the assertion in the petition for removal the amount in controversy exceeded two thousand dollars, this was clearly shown by the record to be untrue and the district court was not deproved of jurisdiction by the apparent attempt to take the case "furtively by a sort of statutory larceny" to the Federal court. Though the case had not been placed on the printed docket after the filing of the transcript in the Federal Court until the entry of dismissal there, it had not been dismissed in the state court. Nor does its omission from the docket appear to have been in pursuance of any order of the latter tribunal. It was still pending, notwithstanding the omission of the clerk, and upon the filing of the amended and substituted petition the court overruled the petition for removal. This asserted its jurisdiction at a time when first presented for its acceptance, and of which nothing had been done to deprive it.

Manifestly, the court retained jurisdiction of the cause and
120 there was no error in proceeding to determine the issues in the ordinary course of litigation.

The petition as first filed did not allege freedom from contributory negligence. It was amended in this respect more than two years afterward, and appellant contends that the plea of the statute of limitations should have been sustained. Cahill vs. Railway, 137 Iowa 577, decides otherwise, and the question is so fully discussed there that nothing need be added.

IV.

The issue of whether decedent was guilty of contributory negligence was withdrawn from the jury and appellant contends that the evidence was not such as to justify the submission of the cause under the doctrine of the last fair chance.

It appears that decedent stood near the crossing when the switch engine moved over the street to the south, where it coupled on to a car and immediately backed over the crossing running decedent down. The engineer and fireman testify that each had his head out of the cab looking north as the engine backed with the tender ahead. Other evidence located decedent, whose vision was impaired, where the fireman, at least, if he looked as he testified, must have seen him feeling his way across the track with his cane in time to have avoided the collision. Added to this the jury might have found that in backing no signal was sounded. Whether the fireman so saw decedent, notwithstanding his denial, was an issue for the jury.

Purcell vs. Ry. 117 Iowa, 667;
Farrell vs. Ry. 123 Iowa, 690;
Gregory vs. Ry. 126 Iowa, 230;

And if he saw him the jury might well have concluded that he should have appreciated the peril of his situation in time to have avoided a collision.

Discovering no error in the record, the judgment is

Affirmed.

121–130 SUPREME COURT OF IOWA,
State of Iowa, ss:

Be it remembered, That on the 22nd day of October, 1912, following proceedings, among others, were had in the Supreme Court of Iowa, to-wit:

No. 28514.

L. M. BACON, Administrator,
vs.
IOWA CENTRAL RAILWAY CO., Appellant.

Appeal from Mahaska County District Court.

In this cause, the Court being fully advised in the premises, file their written opinion Affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby Affirmed, and that a writ of procedendo issue accordingly.

It is further considered by the Court that the Appellant pay the costs of this appeal, taxed at $94.75, and that execution issue therefor.

Signed at the end of the day's proceedings by

EMLIN McCLAIN,
Chief Justice.

* * * * * * *

131 In the Supreme Court of Iowa.

L. M. BACON, Administrator, Appellee,
vs.
IOWA CENTRAL RAILWAY COMPANY, Appellant.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of Iowa:

Comes now the appellant in the above entitled cause and respectfully shows:

That on the 22nd day of October, 1912, the above entitled court handed down its decision in the above entitled case, affirming the judgment rendered against the appellant in the district court of Iowa, in and for Mahaska County, from which court the appeal to this court was prosecuted, that thereafter this appellant filed in due form and within the time required by law and the rules of this court, its petition for a rehearing in said cause; that on the 17th day of January A. D. 1913 this court entered its order over-ruling and denying said petition for a rehearing; that in its said decision the Supreme Court of Iowa held that the district court of Iowa in and for Mahaska County had jurisdiction to hear and determine said cause and denied the jurisdiction of the Circuit Court of the United States in and for the southern district of Iowa, to hear and determine said case, denied that the said Circuit Court of the United States had determined that it had jurisdiction and refused to give force and effect to the judgment and order of said Circuit Court of the United States in said cause.

That the above entitled court is the highest court of the state of Iowa in which a decision could be had in this case; that the judgment so rendered by the Supreme Court of Iowa was unwarranted by law as the appellant is advised.

Appellant presents herewith an assignment of errors and a bond in proper form and prays for an order allowing said appellant to prosecute a writ of error in said case to the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and that an order be entered staying all further proceedings in this court in this cause un-

132 til the determination of said writ of error.

W. H. BREMNER,
F. M. MINER,
JNO. O. MALCOLM,
Attorneys for Appellant.

Writ of error allowed and stay granted this 24th day of February A. D. 1913.

SCOTT M. LADD,
Acting Chief Justice, Supreme Court of Iowa.

133 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Iowa, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Iowa, before you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Iowa Central Railway Company, appellant and plaintiff in error, and L. M. Bacon, administrator, appellee and defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under said statute, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity, or wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the construction of a clause of the constitution or of a treaty, or statute of or commission held under the United States and the decision was against the right, title, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said Iowa Central Railway Company, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in its behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within thirty days from the date hereof in the said Supreme Court: that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and constitution of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, the 24th day of February A. D. 1913.

[Seal U. S. District Court, Southern District of Iowa.]

WM. C. McARTHUR,
Clerk of the District Court of the United States for the Southern District of Iowa.

134 Allowed by—

SCOTT M. LADD,
Acting Chief Justice, Supreme Court of Iowa.

Service of the within writ of error and receipt of a copy thereof admitted this 25th day of February A. D. 1913.

L. T. SHANGLE,
J. U. McCOY, &
D. C. WAGGONER,
Solicitors for L. M. Bacon, Administrator, Defendant in Error.

135 In the Supreme Court of the United States.

IOWA CENTRAL RAILWAY COMPANY, Plaintiff in Error,
vs.
L. M. BACON, Administrator, Defendant in Error.

Assignment of Errors.

Comes now the plaintiff in error in the above entitled cause and avers and shows that in the record and proceedings in said cause, the Supreme Court of the State of Iowa erred to the grievous injury and wrong of the plaintiff herein and to the prejudice and against the rights of the plaintiff in error, in the following particulars, to-wit:

I.

That the said Supreme Court erred in rendering judgment affirming the judgment rendered in the District Court of Iowa, in and for Mahaska County, against the plaintiff in error.

II.

That the said Supreme Court erred in refusing to dismiss said cause on the ground that the said cause was on the 2nd day of October 1905 removed to the Circuit Court of the United States for the southern district of Iowa, and docketed therein, and was on the 11th day of May 1909 dismissed by said Federal Circuit Court for want of prosecution and judgment granted the plaintiff in error for costs.

III.

That the said Supreme Court erred in holding that the state courts had jurisdiction to hear and determine said cause, the same having been removed to the Circuit Court of the United States and the said Circuit Court having entered a judgment therein.

IV.

That the said Supreme Court erred in holding and determining that the state court had jurisdiction of said cause and had jurisdiction to hear and determine the same.

V.

That the said Supreme Court erred in holding and determining that the Circuit Court of the United States in and for the southern

district of Iowa had not decided that it had jurisdiction of said cause.

136 VI.

That the said Supreme Court erred in refusing to give force and effect to the finding of the Circuit Court of the United States to the effect that it had jurisdiction in said cause.

VII.

That the said Supreme Court erred in refusing to give full force and effect to the judgment of the said Circuit Court of the United States in said cause.

VIII.

That the said Supreme Court erred in holding that the state court had jurisdiction of the parties and the subject matter, the same having been removed to the Circuit Court of the United States, the said Circuit Court having assumed jurisdiction thereof, and having never remanded the same to the state court.

Wherefore, for these and other manifest errors appearing in the record, the said Iowa Central Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of Iowa be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error, and plaintiff in error also prays judgment for its costs.

W. H. BREMNER,
F. M. MINER,
JNO. O. MALCOLM,
Attorneys for Plaintiff in Error.

137 In the Supreme Court of the United States.

IOWA CENTRAL RAILWAY COMPANY, Plaintiff in Error,
vs.
L. M. BACON, Administrator, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents; That, we, Iowa Central Railway Company, a corporation organized under the laws of Illinois, as principal, and The United States Fidelity & Guaranty Company, a corporation organized under the laws of the state of Maryland, as surety, are held and firmly bound unto L. M. Bacon, Administrator, in the full and just sum of Fifteen Hundred Dollars ($1500) to be paid to the said L. M. Bacon, Administrator, his successors or assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the 23" day of January A. D. 1913.

Whereas, lately at a session of the Supreme Court of the State of Iowa, in a suit pending in said court between L. M. Bacon, Administrator, Appellee, and Iowa Central Railway Company, Appellant, a final judgment was rendered against the said appellant, and the said Iowa Central Railway Company, Appellant, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit and a citation directed to the said L. M. Bacon, Administrator, is about to be issued, citing and admonishing him to be and appear at the Supreme Court of the United States at Washington within thirty (30) days from the date thereof;

Now, the condition of the above obligation is such that if the said Iowa Central Railway Company shall prosecute its writ of error to effect and answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

IOWA CENTRAL RAILWAY COMPANY,
By W. G. BIERD,
Vice President & General Manager.

[Seal United States Fidelity and Guaranty Company, Incorporated.]

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By WIRT WILSON AND GEORGE E. MURPHY,
Its Attorneys in Fact.

H. J. HENKEL,
MAX SUSSMAN.

Approved:
SCOTT M. LADD,
Acting Chief Justice Supreme Court of Iowa.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 24th day of January 1913, before me, a Notary Public within and for said County and State, personally appeared Wirt Wilson and George E. Murphy, to me personally known, who being by me duly sworn upon oath did say that they are the Agents and Attorneys-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said Wirt Wilson and George E. Murphy did acknowledge that they executed the said instrument as the free act and deed of said Company.

BLANCHE W. SCALLEN,
Notary Public, Hennepin County, Minnesota.

My commission expires Feb. 1st, 1916.

138 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to L. M. Bacon, Administrator, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to the writ of error filed in the clerk's office of the Supreme Court of the State of Iowa, wherein Iowa Central Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Scott M. Ladd, Acting Chief Justice of the Supreme Court of the State of Iowa, this 24th day of February, A. D. 1913.

SCOTT M. LADD,
Acting Chief Justice, Supreme Court, State of Iowa.

Service of the within citation and receipt of a copy thereof admitted this 25th day of February A. D. 1913.

L. T. SHANGLE,
J. U. McCOY,
D. C. WAGGONER,
Solicitor for L. M. Bacon, Administrator, Defendant in Error.

139 STATE OF IOWA, *ss:*

I, B. W. Garrett, Clerk of the Supreme Court of the State of Iowa, do hereby certify that the foregoing pages contain a true and correct transcript of the Abstract, Amended Abstracts, Opinion, final judgment, Petition for Rehearing and ruling on same, in the case of L. M. Bacon, administrator appellee, defendant in error, against Iowa Central Railway Company, appellant, plaintiff in error, as full and complete as the same now appear and remain on file and of record in this office.

I further certify, that the Petition for writ of error, writ of error, assignment of error, Bond on writ of error, with approval endorsed on same, Citation, with acceptance of service of same, are hereto attached in there original form, and true and correct copies of each of them have been retained in this office and this return is made in obedience to said writ of error.

In testimony whereof my name and seal of said Court hereto attached at Des Moines, Iowa, this 11th day of March 1913.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,
Clerk Supreme Court of Iowa.

140 In the Supreme Court of the United States, October Term, 1912.

#1021.

IOWA CENTRAL RAILWAY COMPANY, Plaintiff in Error,
vs.
L. M. BACON, Administrator, Defendant in Error.

To the Clerk of said Court:

Attached hereto is a statement of the errors on which the plaintiff in error will rely on the hearing in the above cause, and the parts of the record which it thinks necessary for the proper consideration of such errors, and which it desires printed, as follows:

1. Abstract of Record except the following portions thereof: Plaintiff's evidence consisting of testimony of W. L. Bough, Zach Barnes, Norris Nelson, John McDonnough, Lewis McMahon, Lewis McMahon, re-called, L. M. Bacon, Wm. Lockhart: Defendant's evidence consisting of the testimony of P. A. Quackenbush, H. B. Howarth, Mike Doud and P. McDonnough.
2. The Assignment of Errors by Appellant; filed as a part of its brief and argument in the Supreme Court of Iowa, under the rules of that court.
3. The Order submitting said cause in the Supreme Court of Iowa.
4. The Opinion of the Supreme Court of Iowa.
5. The Judgment in the Supreme Court of Iowa.
6. The Petition for Writ of Error.
7. Bond on Writ of Error.
8. Writ of Error.
9. Citation and service.
10. Assignment of Errors.
11. Clerk's certificate and return to Writ of Error.
12. Præcipe for printing with service.

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W. H. BREMNER,
F. M. MINER,
JOHN O. MALCOLM,
Attorneys for Plaintiff in Error.

Service of the above and the receipt of copy thereof, including copy of assignments of error, is hereby acknowledged at Oskaloosa, Iowa, this 12th day of June A. D. 1913.

L. T. SHANGLE,
D. C. WAGGONER,
J. N. McCOY,
J. B. BOLTON,
Attorneys for Defendant in Error.

142 In the Supreme Court of the United States.

IOWA CENTRAL RAILWAY COMPANY, Plaintiff in Error,
vs.
L. M. BACON, Administrator, Defendant in Error.

Assignment of Errors.

Comes now the plaintiff in error in the above entitled cause and avers and shows that in the record and proceedings in said cause, the Supreme Court of the State of Iowa erred to the grievous injury and wrong of the plaintiff herein and to the prejudice and against the rights of the plaintiff in error, in the following particulars, to-wit:

I.

That the said Supreme Court erred in rendering judgment affirming the judgment rendered in the District Court of Iowa, in and for Mahaska County, against the plaintiff in error.

II.

That the said Supreme Court erred in refusing to dismiss said cause on the ground that the said cause was on the 2nd day of October 1905 removed to the Circuit Court of the United States for the southern district of Iowa, and docketed therein, and was on the 11th day of May 1909 dismissed by said Federal Circuit Court for want of prosecution and judgment granted the plaintiff in error for costs.

III.

That the said Supreme Court erred in holding that the state courts had jurisdiction to hear and determine said cause, the same having been removed to the Circuit Court of the United States and the said Circuit Court having entered a judgment therein.

IV.

That the said Supreme Court erred in holding and determining that the state court had jurisdiction of said cause and had jurisdiction to hear and determine the same.

V.

That the said Supreme Court erred in holding and determining that the Circuit Court of the United States in and for the southern district of Iowa had not decided that it had jurisdiction of said cause.

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VI.

That the said Supreme Court erred in refusing to give force and effect to the finding of the Circuit Court of the United States to the effect that it had jurisdiction in said cause.

VII.

That the said Supreme Court erred in refusing to give full force and effect to the judgment of the said Circuit Court of the United States in said cause.

VIII.

That the said Supreme Court erred in holding that the state court had jurisdiction of the parties and the subject matter, the same having been removed to the Circuit Court of the United States, the said Circuit Court having assumed jurisdiction thereof, and having never remanded the same to the state court.

Wherefore, for these and other manifest errors appearing in the record, the said Iowa Central Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of Iowa be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error, and plaintiff in error also prays judgment for its costs.

W. H. BREMNER,
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Attorneys for Plaintiff in Error.

[Endorsed:] 1021/23,596.

144 [Endorsed:] File No. 23,596. Supreme Court U. S., October Term, 1912. Term No. 1021. Iowa Central Railway Company, Pl'ff in Error, vs. L. M. Bacon, Adm'x etc. Assignment of errors and designation by plaintiff in error of parts of record to be printed, with proof of service of same. Filed June 16, 1913.

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(23,596)

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 130.

IOWA CENTRAL RAILWAY COMPANY,
Plaintiff in Error,

vs.

L. M. BACON, ADMINISTRATOR OF THE ESTATE OF MARTIN W. LOCKHART, DECEASED,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Brief and Argument of Plaintiff in Error.

W. H. BREMNER,
F. M. MINER,
Attorneys for Plaintiff in Error.

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TABLE OF CASES CITED.

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Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

STATEMENT OF THE CASE.

This cause comes to this court upon writ of error directed to the Supreme Court of the State of Iowa, to review a judgment of that court, upon the ground that the State Court was without jurisdiction, the United States Circuit Court for the Southern District of Iowa, having assumed jurisdiction thereof on removal, and upon the further ground that the State Court refused to give effect to a judgment of a United States Court. The plaintiff in error in this court was the defendant below, and

the defendant in error in this court was plaintiff below. The facts in so far as they are material are as follows:

On the 17th day of April, 1905, Martin W. Lockhart was killed in the city of Oskaloosa, Iowa, by being run over by an engine belonging to the Railway Company. The defendant in error was duly appointed administrator of the estate of the said Martin W. Lockhart, deceased, and on the 20th of September, 1905, commenced an action in the District Court of Iowa, in and for Mahaska county against the Railway Company to recover damages for the claimed wrongful killing of his intestate, by the service of an original notice (R., p. 1). (Under the law of Iowa actions are commenced by the service of what is called an original notice, in which notice the plaintiff must set forth the substance of his claim, the amount demanded and the date the petition in the cause will be filed in the office of the clerk of the District Court.)

In the original notice it was stated that the amount which would be claimed in the petition was ten thousand dollars. Pursuant to said notice the defendant in error filed in the office of the clerk of the District Court of Mahaska county on the 22nd day of September, 1905, his petition (R., p. 2). In the petition it was alleged that the estate had been damaged in the sum of ten thousand dollars, but judgment was demanded for one thousand nine hundred and ninety dollars.

On the 30th day of September, 1905, the plaintiff in error filed its answer in the said cause (R.,

p. 2), and on the 2nd day of October, 1905, and within the time required by law, the plaintiff in error filed its petition for removal of said cause to the United States Circuit Court in and for the Southern District of Iowa, on the ground of diversity of citizenship, alleging that the amount in controversy, exclusive of interest and costs, exceeded the sum of two thousand ($2,000.00) dollars (R., p. 3). Accompanying the petition for removal was a bond for costs (R., p. 4). The District Court of Mahaska county did not enter any order directing the removal of the cause but on the 29th day of March, 1906, the clerk of the said District Court of Mahaska county filed in the office of the clerk of the Circuit Court of the United States, in and for the Southern District of Iowa, a transcript of the proceedings in said cause (R., p. 5). This transcript was duly certified by the clerk of said District Court of Iowa and the signature of said clerk was duly attested by the judge of said District Court (R., p. 5). After the filing of the said transcript in the United States Court the cause was dropped from the docket of the Iowa District Court (R., p. 5). After the filing of the transcript in the United States Court the cause was continued from term to term by orders duly signed by the judge thereof and duly recorded (R., pp. 14-15), until on the 5th day of December, 1908, an order to notice said cause for trial at the next term, or show cause why it should not be dismissed, was entered, and the clerk was directed to mail and serve copy of said order on the attorneys for the parties (R.,

p. 16). On May 11th, 1909, there was entered in said Circuit Court of the United States an order of dismissal at plaintiff's (defendant in error) cost, for want of prosecution, and the defendant (plaintiff in error) was given judgment for its costs (R., pp. 16-17). On the 19th day of September, 1912, more than four years after the transcript had been filed in the United States Court, and more than a year after the case had been dismissed by said court, the defendant in error filed in the office of the clerk of the District Court of Iowa, in and for Mahaska county, a pleading which he entitled an Amended and Substituted Petition, and thereupon the clerk of said court placed the case again upon the docket (R., p. 5).

On the 6th day of October, 1910, the District Court of Mahaska county entered an order denying the application of the defendant (plaintiff in error) for removal of the cause to the United States Circuit Court, on the ground that the amount in controversy exclusive of interest and costs was less than two thousand dollars (R., p. 7). The application for removal referred to in the order is the one which was filed on October 2nd, 1905.

After the entry of said order various pleadings were filed by both parties (R., pp. 7-11), and on the 28th day of February, 1911, the plaintiff in error filed a motion to dismiss the cause and to strike from the files the pleadings filed by the defendant in error subsequent to the 1st day of September, 1905, the pleadings referred to being those filed in 1910 and 1911 (R., p. 11). This motion was based

on the ground that the cause had been removed to the United States Circuit Court and docketed therein, and thereafter dismissed by said Federal Court for want of prosecution, and that said cause had never been remanded by said Federal Court to the State Court. Attached to said motion and made a part thereof was a certified copy of the record made in the United States Court (R., p. 12). This record is set out on pages 12 to 17 of the transcript of the record in this case.

A hearing was had on this motion and on the 4th day of March, 1911, the Iowa District Court entered an order denying the motion (R., p. 19). On the 6th day of March the case came on for trial in the District Court, and such proceedings were had that the jury returned a verdict in favor of the plaintiff in the sum of eight hundred and fifty dollars (R., p. 26). The defendant (plaintiff in error), on the 13th day of March, 1911, filed its motion for a new trial upon various grounds, including the grounds set forth in the motion to strike heretofore referred to, which motion was denied (R., p. 28), and on the 10th day of March, 1911, a judgment was duly entered of record in favor of the plaintiff against the defendant in the sum of eight hundred and fifty ($850.00) dollars and costs. From this judgment the defendant (plaintiff in error) perfected its appeal to the Supreme Court of the State of Iowa (R., p. 29), with the result that the judgment of the lower court was duly affirmed, thus rendering the judgment final (R., p. 35). The Supreme Court of Iowa in substance held that the

amount in controversy did not exceed two thousand dollars, that there was no adjudication of the right of removal by the United States Circuit Court, and that the State Court had never lost jurisdiction and there was no error in proceeding to determine the issues.

The questions to be determined by this court are:

Did the State Court lose jurisdiction by reason of the removal to the United States Circuit Court?

Were the proceedings had in the United States Court such as to constitute a determination by that court that it had jurisdiction?

Is the effect of the action taken by the State Courts a refusal to give proper recognition to a judgment of the Circuit Court of the United States?

ASSIGNMENT OF ERRORS.

The plaintiff in error asserts that the Supreme Court of the state of Iowa erred in the following particulars, to-wit:

1.

That the said Supreme Court erred in rendering judgment affirming the judgment rendered in the District Court of Iowa, in and for Mahaska county, against the plaintiff in error.

2.

That the said Supreme Court erred in refusing to dismiss said cause on the ground that the said

cause was on the 2nd day of October, 1905, removed to the Circuit Court of the United States for the southern district of Iowa, and docketed therein, and was on the 11th day of May, 1909, dismissed by said Federal Circuit Court for want of prosecution and judgment granted the plaintiff in error for costs.

3.

That the said Supreme Court erred in holding that the State Courts had jurisdiction to hear and determine said cause, the same having been removed to the Circuit Court of the United States and the said Circuit Court having entered a judgment therein.

4.

That the said Supreme Court erred in holding and determining that the State Court had jurisdiction of said cause and had jurisdiction to hear and determine the same.

5.

That the said Supreme Court erred in holding and determining that the Circuit Court of the United States in and for the Southern District of Iowa had not decided that it had jurisdiction of said cause.

6.

That the said Supreme Court erred in refusing to give force and effect to the finding of the Circuit Court of the United States to the effect that it had jurisdiction in said cause.

7.

That the said Supreme Court erred in refusing to give full force and effect to the judgment of the said Circuit Court of the United States in said cause.

8.

That the said Supreme Court erred in holding that the State Court had jurisdiction of the parties and the subject matter, the same having been removed to the Circuit Court of the United States, the said Circuit Court having assumed jurisdiction thereof, and having never remanded the same to the State Court.

BRIEF.

I.

The Amount in Controversy.

The decision of the Supreme Court of Iowa to the effect that the amount in controversy is to be determined by the prayer for judgment contained in the petition, being a decision upon a question of state practice based upon the interpretation of the statutes of the state is probably final as to the amount in controversy, so long as the case remained in the courts of Iowa, and, therefore, is probably not reviewable in this court. After the removal to the United States Court the amount in controversy would be for determination by the Federal Court under the rules of practice prevailing in that court.

However that may be, prior to the decision in this case this question was an open one in the State of Iowa, and there was ample authority for holding that in determining the amount in controversy the prayer of the petition should be disregarded. In support of this we submit the following:

1. In Iowa actions are commenced by the service of what is called an original notice, which must state, among other things, if the action is brought to recover money, the amount thereof. The commencement of actions is governed by Section 3514 of the Code of 1897, which reads as follows:

> "ORIGINAL NOTICE. Action in a court of record shall be commenced by serving the defendant with a notice, signed by the plaintiff or his attorney, informing him of the name of the plaintiff, that a petition is, or on or before the date named therein will be, filed in the office of the clerk of the court wherein action is brought, naming it, and stating in general terms the cause or causes thereof, and if it is for money, the amount thereof, and that unless he appears thereto and defends before noon of the second day of the term at which defendant is required to appear, naming it, his default will be entered and judgment or decree rendered against him thereon. In all cases where the time for the commencement of the term has been changed after the notice has been served, the defendant shall be held to appear at the time to which such term has been changed."

2. Under the Code of Iowa the petition of the plaintiff must contain, among other things, a demand for the relief to which the plaintiff considers himself entitled. This section in so far as it is ma-

terial to this case reads as follows:

> "The petition must contain: * * * 4. a demand of the relief to which the plaintiff considers himself entitled and if for money the amount thereof."

3. Section 3775 of the Code of 1897 of Iowa provides:

> "WHAT RELIEF GRANTED. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he has demanded in his petition. In any other case the court may grant him any relief consistent with the case made by the petition and embraced within the issue."

4. The original notice fixed the amount which would be claimed by the plaintiff at ten thousand dollars (R., p. 1). The petition alleged that because of the claimed wrongful killing of the plaintiff's intestate, the plaintiff had been damaged in the sum of ten thousand ($10,000.00) dollars (R., p. 2).

5. Under statutes similar to the statutes of Iowa above referred to, it has been held that after an answer has been filed the prayer for relief becomes immaterial and that the court may give judgment for such an amount as is consistent with the issues made and the proof.

Marquat v. Marquat, 2 Kern. (12 N. Y. 336).

1 Bates' Pleading 315.

Erck v. Omaha National Bank, (Nebr.) 62 N. W. 67.

6. The prayer for relief forms no part of the petition and the sufficiency and character thereof,

as well as the amount involved must be determined from the facts stated and not from the prayer for relief.

Henry v. McKittrick, 42 Kas. 485.

Tiffin Glass Co. v. Stoehr, 54 Ohio State 157.

7. The Supreme Court of Iowa had prior to the decision in this case, in various opinions held that the plaintiff was not limited to the relief asked by his petition.

In the case of *Wilson v. Miller & Beeson*, 16 Iowa 111, the court said:

> "Where an answer is filed the plaintiff is not limited to the relief asked by his petition, but may have any relief consistent with the case made by the petition and embraced within the issues (Revised Section 3133)."

Section 3133 referred to in the opinion is Section 3133 of the Revision of the Code of Iowa of 1860, and is identical with Section 3775 of the Code of 1897 above quoted.

In the case of *Marder Luse & Co. v. Wright*, 70 Iowa 42, 45, the Supreme Court of Iowa approves the opinion in the case of *Wilson v. Miller, supra*, saying:

> "When an answer is filed he (the court) may award any relief consistent with the case, made by the petition or embraced within the issues made by the answer."

In the case of *Johnson v. Rider*, 84 Iowa 50, the lower court had given judgment for an amount greater than that demanded in the petition, and in reference thereto the court said on page 54:

"The relief granted was consistent with the case made by the petition, was embraced within the issues presented by the pleadings, and was shown by the evidence to be due to the plaintiff. We do not think the judgment should be disturbed on the ground that it is excessive."

II.

THE STATE COURT WAS WITHOUT JURISDICTION, THE CASE HAVING BEEN ACTUALLY REMOVED TO THE UNITED STATES CIRCUIT COURT AND THAT COURT HAVING DETERMINED IT HAD JURISDICTION THEREOF.

1. A petition for removal in proper form accompanied by bond for costs as required by law, was duly filed in the State District Court within the time required by law (R., pp. 3, 4). Thereafter the clerk of the District Court of Iowa prepared and filed in the office of the clerk of the Circuit Court of the United States in and for the Southern District of Iowa a transcript of the proceedings in the State Court. This transcript was duly certified by said clerk of the State Court and the signature of such clerk was duly attested by the judge of the State Court (R., pp. 5, 13). After the filing of the transcript of the Federal Court the case was dropped from the docket in the State Court until September 19th, 1910, more than four years after the filing of the transcript in the United States Court (R., pp. 5-19).

2. After the filing of the transcript in the United States Court the case was continued from term

to term by orders of the court duly entered of record, the first being entered on December 5th, 1906. On December 5th, 1908, an order was entered to the effect that unless the case was noticed for trial at the next term, or good reason shown for not doing so, the same would be dismissed for want of prosecution. On May 11th, 1909, an order was entered in the following terms, to-wit:

> "This cause came on this day for hearing, the defendant appearing by John I. Dille, and plaintiff not appearing, the same was dismissed at plaintiff's cost for want of prosecution. Thereupon it was ordered that the defendant go hence without day and recover its costs, taxed at .....dollars, and that execution issue therefor" (R., pp. 14-16).

3. The fact that no order directing the removal of the case was entered by the State Court is immaterial, as such an order or the failure to make such an order does not affect the question of removal.

Brigham v. C. C. Thompson Lbr. Co., 55 Federal 881-884.

State v. Coosaw Mining Co., 45 Federal 804-809.

LaPage v. Day, 74 Federal 977.

Kern v. Huidekoper, 103 U. S. 485.

Eisemann v. Delmar's Nevada Gold Mining Co., 87 Federal 248.

Loop v. Winter's Estate, 115 Federal 362.

Van Horne v. Litchfield, 70 Iowa 11.

Byson v. McPherson, 71 Iowa 437.

Ohle v. C. & N. W. Ry. Co., 64 Iowa 599.

Chambers v. Illinois Cent. Ry. Co., 104 Iowa

238.

Myers v. C. & N. W. Ry., 118 Iowa 312, 325.

Turner v. Farmers' Loan & Trust Co., 106 U. S. 552.

Marshall v. Holmes, 141 U. S. 589-595.

4. The case was actually removed, whether rightfully or not, and the State Court lost jurisdiction by such removal and could only recover jurisdiction by remand from the Federal Court or the commencement of a new action.

State v. Coosaw Mining Co., 45 Federal 804, 809.

C. & O. Ry. Co. v. McCabe, 213 U. S. 207.

5. If the Federal Court was without jurisdiction because the case was not removable, the remedy of the plaintiff was by moving to remand in the Federal Court.

Turner v. Farmers' Loan & Trust Co., 106 U. S. 552, 555.

C. & O. Ry. Co. v. McCabe, 213 U. S. 207, 218.

Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552, 559.

Judge v. Arlen, 71 Iowa 186.

6. A petition for removal sufficient in all respects and in proper form, and a good and sufficient bond being filed, the case was removed, and thereafter only the Federal Court could determine whether or not it had jurisdiction.

Van Horne v. Litchfield, 70 Iowa 11.

Byson v. McPherson, 71 Iowa 437.

Turner v. Farmers' Loan & Trust Co., 106 U. S. 552.

C. & O. Ry. Co. v. McCabe, 213 U. S. 207.

Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552-559.

Ohle v. C. & N. W. Ry. Co., 64 Iowa 599.

Myers v. C. & N. W. Ry. Co., 118 Iowa 312-325.

Carson v. Hyatt, 118 U. S. 279-287.

Burlington Ry. Co. v. Dunn, 122 U. S. 513.

State v. Coosaw Mining Co., 45 Federal, 804-809.

Eisemann v. Delamar's Gold M. Co., 87 Fed. 248.

Starr v. C. R. I. & P., 110 Federal 3-6.

7. Even though no question as to the jurisdiction of the Federal Court was raised in that court by any party to the litigation it must be presumed that the court determined for itself that it had jurisdiction before proceeding with the case, and even though jurisdiction was improperly assumed, nevertheless the judgment of the United States Court is binding until reversed.

Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552.

8. Even if it be true that orders continuing the case from time to time are only to be considered as a postponement of action and not as indicating that the court had assumed jurisdiction, this would not be true as to an order of dismissal and a judgment for costs. The Federal Court must have found that it had jurisdiction in order to give to either

party a judgment against the other for any amount whatsoever. If it had determined that it did not have jurisdiction its duty would have been to remand the case to the State Court, even though no motion asking for a remand was made, and in the event of such remanding it should have given judgment for costs against the party causing the removal.

9. The judgment for costs entered by the United States Court in favor of the plaintiff in error (R., pp. 16, 17), is still in full force and effect, never having been set aside or reversed and cannot be treated as a nullity.

10. The effect of the decision by the Supreme Court of Iowa is to hold that the judgment of the United States Court is a nullity and the action of the State Courts amounts to a refusal to give effect to a valid existing judgment of a United States Court.

ARGUMENT.

The Amount in Controversy.

The first question for determination by the Supreme Court of Iowa was whether the amount in controversy in this case exceeded $2,000.00. Upon this question the Supreme Court of Iowa held that the amount in controversy was to be determined by the amount for which judgment was prayed, notwithstanding the allegation in the petition that the plaintiff had been damaged more than that sum

(R., p. 32). The opinion was based upon an interpretation of the statutes of Iowa and as a matter of statutory construction would be undoubtedly binding upon the United States courts. At any rate it is certain that it is determinative of the fact that had the case remained in the State Court the plaintiff below could not have recovered more than the amount for which judgment was prayed, to-wit: $1,990.00. In its opinion the court says that "it may be conceded that there are authorities which seem to hold that under like statutes the prayer for relief becomes wholly immaterial after an answer has been filed" (R., p. 31).

The Supreme Court of Iowa itself had in previous cases used language which justified a belief that in a like action the plaintiff was not bound by the relief demanded in the petition. In the case of *Johnson v. Rider*, 84 Iowa 50, cited in the brief it is said on page 54:

> "Some question is made as to the amount of the judgment, and it is said it is greater than that demanded in the petition. The relief granted was consistent with the case made by the petition, was embraced within the issues presented by the pleadings and was shown by the evidence to be due the plaintiff. We do not think the judgment should be disturbed on the ground that it is excessive."

This opinion was handed down in October, 1891. It would appear, therefore, that the plaintiff in error had ample grounds for believing that the amount in controversy was to be determined not by the prayer for relief but by the body of the petition, and that the Federal Court had ample ground for

holding that the amount in controversy was not to be determined by the prayer for judgment.

It is a general rule that all questions relating to the right of removal are questions for the Federal Courts and not for the State Courts, but it is probable that in determining a question pertaining to the right of removal, which depends more or less upon the construction to be given to state statutes, the Federal Courts should follow the interpretation given to such statutes by the highest court of the state.

It may, therefore, be conceded that in view of the opinion of the Supreme Court of Iowa, as this case stood when commenced in the District Court of Mahaska county, the amount involved was less than $2,000.00. The case having once been removed, however, to the Federal Court, the question of the amount which plaintiff might recover in that court is no longer one of statutory construction but one of general law, which the Federal Court could determine for itself.

That there was ample support for a holding by the Federal Court that the amount involved exceeded $2,000.00, is indicated in our brief, *supra*.

Whether or not the Iowa court was correct in holding that the amount in controversy did not exceed $2,000.00, or whether or not the Federal Court was wrong in assuming jurisdiction is, in our view of the case, wholly immaterial, for the reason that the Federal Court having determined that there was more than $2,000.00 involved, and having assumed jurisdiction and having rendered judg-

ment, and that judgment remaining unreversed, and its decision upon the question of jurisdiction remaining unreversed, the question is foreclosed.

II.

The Jurisdiction of the State Court.

The record discloses that the plaintiff (defendant in error) commenced his action on the 20th day of September, 1905, by the service of an original notice, in which he stated that he would demand damages in the sum of $10,000.00 (R., p. 1). In his petition which was filed on September 22nd, 1905, he alleged that he had been damaged in the sum of $10,000.00 (R., p. 2). On the 2nd of October, 1905, and within the time required by law, the defendant filed its petition for removal upon the ground of diversity of citizenship, accompanied by bond for costs (R., pp. 3, 4). The petition alleged the amount in controversy to be more than $2,000.00, exclusive of interest and costs, and it was properly verified. Thereafter the clerk of the State District Court prepared a transcript of the record duly certified to by him, his signature being attested by the then judge of the District Court (R., pp. 5, 13). This transcript was on the 29th day of March, 1906, duly filed in the office of the clerk of the United States Circuit Court for the Southern District of Iowa (R., pp. 5, 13). After the filing of said transcript of the Circuit Court of the United States, no further proceedings were had in the State Court, and the case was dropped from the docket until

September, 1910, when an amended and substituted petition was filed by the defendant in error (R., p. 5). On the 6th day of October, 1910, the State District Court entered an order denying the application of plaintiff in error for removal of the cause to the United States Circuit Court (R., p. 7). This order relates to the application for removal filed in 1905, and we attach no importance to it, and cannot conceive how it can have any bearing upon this controversy, for the reason that it was entered long after the case was actually removed to the Federal Court and after the Federal Court had assumed jurisdiction and had dismissed the case. If we are right in our contention that the State Court lost jurisdiction by an actual removal of the case to the Federal Court and the assumption of jurisdiction by that court, then the order entered on the 6th day of October, 1910, is a nullity.

After the filing of the transcript of the record in the Federal Court, that court by various orders continued the case from time to time, and on December 5th, 1908, entered an order directing that unless the cause was noticed for trial at the next term or good reason shown for not so doing, it would be dismissed for want of prosecution, and on May 11th, 1909, the case coming on to be heard and the defendant appearing by its attorney, and the plaintiff (defendant in error), not appearing, the Federal Court dismissed the case at plaintiff's cost for want of prosecution, entered a judgment in favor of the defendant (plaintiff in error), for costs and directed that execution issue therefor (R., pp.

16, 17).

Upon this record it is the contention of the plaintiff that the State Court lost jurisdiction of the case and after the removal in 1905 was without power or authority to proceed further, and that it therefore erred in holding that it had jurisdiction, in overruling the defendant's motion to dismiss, in overruling defendant's motion in arrest of judgment on the ground of want of jurisdiction and in refusing to give effect to the judgment of the United States Circuit Court, and that the Supreme Court of Iowa erred in sustaining the lower court in so doing.

It is unimportant that no formal order of removal was entered in the State Court before the preparation of the transcript, and its filing with the clerk of the United States Court, as such an order is not necessary in order to effectuate a removal. The transcript was made, certified and attested voluntarily by the clerk and the judge of the State Court, and not in response to any writ from the Federal Court, and the dropping of the case from the docket of the State Court was also voluntary. The effect of the acts of the State Court was to constitute an actual removal or transfer of the case to the Federal Court. If a formal order had been entered by the State Court directing the removal we apprehend that we would not now be here, but that the State Court would never have attempted to again assert jurisdiction of the case, and yet the acts of the State Court in preparing and certifying to the transcript, and filing the same with the clerk

of the United States Court had the same effect as though a formal order had been entered directing the removal.

If the lower court had entered an order directing the removal of the case to the Federal Court such order could not have been reviewed on appeal to the Supreme Court of the State of Iowa. In the case of *Sundberg v. Babcock*, 61 Iowa 601, the Supreme Court of Iowa held that no appeal should or could be taken from an order transferring a case to the United States Court. If that court had no power to review an order of the District Court, transferring a case to the Federal Court how could the District Court itself, four years after it had in effect directed a removal, review its own act. The effect of an order of removal entered by the order of the State Court, or the effect of an actual removal, even though an order is not entered, is to take action which is final in so far as the State Court is concerned. After the actual removal had taken place the Federal Court was the only court which had power to pass upon the question of jurisdiction. Whether the District Court of the state acted erroneously or not in transferring the case to the United States Court, nevertheless by so doing it lost jurisdiction and could not by any procedure on its own part reinvest itself with jurisdiction of the same case. After the filing of the transcript in the Federal Court, whether erroneously or not, there was nothing left in the State Court. The case was no longer pending in that court. Whether the case was properly removable or not the State Court,

having voluntarily assented to the removal that court lost jurisdiction and the Federal Court having assumed jurisdiction and having entered judgment of dismissal and for costs, such judgment is not only valid but is to be treated as in full force and effect until reversed.

It is well settled that the Federal Court alone has power to determine the extent of its jurisdiction, and whether or not it has jurisdiction in any particular case, and such right is not in any degree or manner affected by anything which the State Court may do.

This is not a case in which the State Court elected to retain jurisdiction after the petition for removal had been filed, but it voluntarily surrendered its jurisdiction. If the State Court had not voluntarily granted a removal the plaintiff in error would have had the right to appear before the Circuit Court of the United States, and by proper proceedings obtained an order requiring the State Court to certify the record to it, and the Federal Court having decided that it had jurisdiction it might by injunction have prevented further proceedings in the State Court. These principles are so well settled that a reference to the authorities in support thereof would serve no useful purpose.

Will this court hold that the State Court, by voluntarily surrendering jurisdiction, may place itself in a better position than it would be if had been required to forward a transcript to the United States Court by an order of that court; that, after having voluntarily surrendered its jurisdic-

tion and the Federal Court having asserted jurisdiction, the State Court may again invest itself with jurisdiction without any action to that end on the part of the Federal Court?

It must be assumed that the United States Circuit Court was of the opinion that it had jurisdiction else it would not have taken the case and entered orders therein. It is true that the record does not disclose that the question of jurisdiction was ever raised by a motion to remand or otherwise in that court, but the presumption is that the court itself before entering any orders in the case, and before entering judgment did determine that it had jurisdiction.

Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552-559.

We understand the rule to be that when a case is presented to a Federal Court its first duty is to determine for itself whether or not it has jurisdiction, and if it determines that it has not, to proceed no farther, and that this is its duty whether or not any party litigant questions the jurisdiction.

The Supreme Court of Iowa in its opinion says that the Federal Court never ruled on the question of whether it acquired jurisdiction (R., p. 33). It further says:

> "It merely entered orders continuing the case and finally dismissed the same without ruling hereon, or on its merits. Continuance orders were not inconsistent with the want of jurisdiction for this simply postponed action of any kind touching the disposition of the case. Nor was the dismissal a bar to the prosecution of another action."

Whatever may be the effect of the orders of continuance it certainly cannot be said that the entering of an order of dismissal and of a judgment for costs did not require a determination on the part of the United States Court of the question of jurisdiction. The order of dismissal ended the case. The order for a judgment was necessarily contingent upon proper jurisdiction. If the Federal Court had not determined that it had jurisdiction of the case then it would have been its duty to enter an order remanding the case to the State Court. No such order having been entered it must be presumed that the Federal Court determined that it did have jurisdiction. It may be true that this order of dismissal was not a bar to the prosecution of another action, but the difficulty is that we are not considering in this case another action. The Supreme Court of Iowa has permitted the defendant in error to maintain the same action. Another action could not have been maintained by the defendant in error for the reason that the statute of limitations had run prior to the entry of the order of dismissal in the United States Court. The Supreme Court of Iowa expressly held that the plea of the statute of limitations was not good for the reason that the filing of the amended petition in 1910 was but a continuance of the original action commenced in 1905 (R. p. 34).

The Supreme Court of Iowa in its opinion implies that if this case had proceeded to a judgment on its merits in the Federal Court it would have been bound to consider such a judgment as a

good plea in bar of the action in the State Court. The Federal Court when it entered its order directing that the case be noticed for trial at the next term or it would be dismissed, said to both parties: "This court is ready to try this case," and if both parties had appeared at the next term undoubtedly the case would have proceeded to a trial on its merits, and if at the conclusion of the plaintiff's testimony it had appeared that he had no cause of action the cause might have been dismissed and a judgment for costs granted to the defendant, and the final entry would have been identical with the final entry made, save only as to the cause of the dismissal. We can see no difference between a judgment for costs rendered after a full hearing on the merits, and a judgment for costs rendered against one of the parties because of his failure to appear, the other party having appeared.

The difficulty into which the Supreme Court of Iowa seems to have fallen is due to the fact that it assumed that since in its opinion the case was not properly removable, the acts of the State Court actually removing the case are to be treated as a nullity, and that it was still pending in the State Court, notwithstanding the fact that it had actually been removed to the Federal Court and that court had assumed jurisdiction. In other words, the opinion of the Supreme Court of Iowa is based upon the assumption that the case being not properly removable, no act on the part of the State Court or the Federal Court could accomplish a removal. In so holding it is at variance with the

opinions heretofore rendered by this court.

The Supreme Court of Iowa entirely overlooks the fact that the Federal Statutes provide a remedy in case a cause is improperly removed to the Federal Court, this remedy being the filing of a motion to remand in the United States Court. This was the only remedy which was open to the defendant in error after the case had been docketed in the United States Court.

In the case of *Chesapeake & Ohio Ry. v. McCabe*, 213 U. S. 207, the court, on page 218, quoting from the opinion of Mr. Chief Justice Waite in *Railroad Co. v. Koontz*, 104 U. S. 4, says:

> "The right to remove is derived from a law of the United States, and whether a case is made for removal is a Federal question. * * * When the suit is docketed in the Circuit Court, the adverse party may move to remand. If his motion is decided against him, he may save his point on the record and after final judgment bring the case here for review if the amount involved is sufficient for our jurisdiction. If in such case we think his motion should have been granted, we reverse the judgment in the Circuit Court and direct that the suit be sent back to the state court to be proceeded with there as if no removal had been had. If the motion to remand is decided by the Circuit Court against the petitioning party, he can at once bring the case here by a writ of error or appeal for a review of that decision without regard to the amount in controversy."

On page 219 *et seq.*, of the same opinion it is said:

> Conceding that, except for the principle of comity, the state court may decide the question of jurisdiction for itself in the absence of an injunction from the Federal Court in aid of

its own jurisdiction, or a writ of certiorari requiring the state court to surrender the record under the act of 1875, is the state court obliged to give effect to the judgment of the United States Circuit Court from which no writ of error is taken, and rendered in the Federal Court after it has sustained its own jurisdiction and refused to remand the action?

In view of the fact that the question is a Federal one, and that the state court is given no right to review or control the exercise of the jurisdiction of the Federal Court, we think that such Federal judgment cannot be ignored in the state court as one absolutely void for want of jurisdiction, and that such judgment until reversed by a proper proceeding in this court, is binding upon the parties, and must be given force when set up in the action. This view is sustained in the former decisions of this court upon the subject. In *Des Moines Navigation Company v. Iowa Homestead Company*, 123 U. S. 552, this court considered the effect of a judgment rendered in the Federal Court upon removal from the state court. In that case it appeared that the Federal court ought not in fact to have taken jurisdiction, for it appeared upon the face of the record that some of the defendants who did not join in the petition for removal were citizens of the same state as the plaintiff. The state court of Iowa refused to give effect to the judgment of the Federal Court, and its judgment was reversed.

Mr. Chief Justice Waite, speaking for the court said (123 U. S. 559):

"Whether in such a case the suit could be removed was a question for the Circuit Court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate on matters in dispute between two

citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal."

In *Dowell v. Applegate*, 152 U. S. 327, the benefit of a judgment in the Circuit Court of the United States was claimed. That judgment was the basis of a conveyance to the plaintiff in error, and it was contended that the conveyance was void, inasmuch as the Federal Court had no jurisdiction of the suit in which the sale was ordered. It was held in his court that even if the Federal Court erred in assuming or retaining jurisdiction of the suit, its decree being unmodified and unreversed, could not be treated as a nullity. After citing previous decisions of this court, the court, speaking through Mr. Justice Harlan, said (152 U. S. 340):

"These cases establish the doctrine that, although the presumption in every stage of a cause in a Circuit Court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, *Bors v. Preston*, 111 U. S. 252, 255, and the authorities there cited, yet, if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity.

"These authorities, above cited, it is said, do not meet the present case, because the ground on which, it is claimed the Federal Court as-

sumed jurisdicion was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error or appeal to this court.'

Applying these principles to the case at bar, we think the state court erred in refusing to give effect to the judgment set up in the answer offered in the state court. When the application for removal was made in the State Circuit Court, that court held the case removable, and the record was filed in the Federal Court. Afterwards that court, upon the application of the plaintiff refused to remand the suit, and proceeded to a final determination thereof, and rendered judgment accordingly.

It is not necessary to determine whether the case was removable or not. The Federal Court was given jurisdiction to determine that question, it did determine it, and its judgment was conclusive upon the parties before it, until reversed by a proper proceeding in this court. Instead of bringing the case here the plaintiff proceeded in the state court, and that court denied effect to the Federal judgment. The plaintiff in error lost no right when thus compelled to remain in the state court, notwithstanding the Federal judgment in his favor, and brought the suit here by writ of error to the final judgment of the state court, denying his right secured by the Federal judgment. It was open to the plaintiff to bring the adverse decision of the Federal Court on the question of jurisdiction to this court for review. This course was not pursued, but the action proceeded in the state court evidently

upon the theory that the judgment of the Federal Court was a nullity if it had erred in taking jurisdiction.'"

From this opinion it clearly appears that when the Federal Court has once taken jurisdiction on removal, whether or not the case was properly removed, its acts are not a nullity, but must be given full force and effect until reversed. The judgment in the Federal Court dismissing the action was binding upon the State Court, and since it was a dimissal of the very action which the court attempted to try, the court was without jurisdiction.

At the time the amended and substituted petition was filed in September, 1910, there was no case pending. The court had no right to receive and file a pleading in the case and such pleading should have been stricken. It makes no difference whether the case was removable or not. By taking jurisdiction and entering orders therein, the Federal Court has determined that it did have jurisdiction and that the case was removable. Such finding stands unreversed. It is apparent from the record also that the State District Court was of the opinion when the petition was filed in 1905 that the case was removable, for from the time the petition was filed, the State Court stopped all proceedings and the then district judge attached his signature to the transcript for the purpose of attesting the signature of the clerk. After the removal was had the defendant in error had a plain speedy way in which to have determined the question of whether or not the cause was removable. He could have

filed his motion to remand in the Federal Court and if the motion was denied he could have appealed to this court. He did not choose to follow this remedy, the course outlined by the United States statute.

He is not in a position to complain now even if the case was not removable. He has lost his day in court by failing to take the course which was open to him. It entailed no hardship upon him. No excuse is offered for failure to file his motion to remand in the Federal Court.

The proceeding on removal and the acts of the Federal Court are not a nullity, and cannot be ignored in the State Court in the manner in which they were ignored in this case. They are still in full force and effect, as is clearly pointed out in the opinion in the case of the *Chesapeake v. McCabe, supra,* and the opinions therein referred to.

In the case of *Dowell v. Applegate,* 152 U. S. 327, there is a very full discussion of the question of whether, if the Federal Court erred in assuming or retaining jurisdiction of a case, it follows that its final decree, unmodified and unreversed, can be treated as a nullity, and it was held that even if the court erred in entertaining jurisdiction, its determination was conclusive upon the parties before it and could not be questioned by them or either of them collaterally or otherwise than on writ of error or appeal to this court. In this opinion the court quotes with approval from the case of *Des Moines Navigation Co. v. Iowa Homestead Com-*

pany, 123 U. S. 552, as follows:

> "As said in *Des Moines Nav. Co. v. Iowa Homestead Co.*, above cited, if the Circuit Court 'kept the case when it ought to have been remanded or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal.'"

There seems to be no escape from the doctrine that the Federal Court having once assumed and exercised jurisdiction, its doing cannot be treated as a nullity even though it assumed jurisdiction wrongfully. That the remedy of the parties to the action is by appeal from the judgment of the lower Federal Court. It is immaterial that the question of jurisdiction of the Federal Court was not directly raised in that court for the reason that the court is presumed to have determined that it did have jurisdiction. In the case of *Des Moines Navigation Co. v. Iowa Homestead Company,* 123 U. S. 552, the question to be determined was whether the Supreme Court of Iowa had given force and effect to a prior adjudication of the issue by the Federal Court in the case of *Homestead Valley v. Railroad*

Co., 17 Wallace 153. It appeared that the latter case had been commenced in the State Court, had been removed to the Federal Court and the Federal Court had assumed jurisdiction and the question had proceeded to a final determination. No motion to remand was made and the question of jurisdiction was not specifically raised, but nevertheless the court held that, "Whether in such a case a suit could be removed was a question for the Circuit Court to decide when it was called on to take jurisdiction," and it was held that whether the suit was rightfully removed or not, the action of the Federal Court was not a nullity, and that the State Court must give full force and effect to its decree.

From these holdings of the Supreme Court of the United States it seems clear that the District Court of Mahaska county was without power or right to proceed with the trial of this case. It had no power to pass upon the question of jurisdiction after the actual removal to the Federal Court. Even though the removal was wrongful, the Federal Court alone had power to pass upon the question. It follows, therefore, that the question of the removability of this case has already been determined adversely to the plaintiff and the right of removal has been upheld by the Federal Circuit Court and that decision is still in force and effect and binding upon the defendant in error. He is not, therefore, in a position to question the right of the plaintiff in error to have the case removed. The action of the Federal Court in assuming jurisdiction and in entering judgment was a determination that the

case was removable and the question is no longer open.

Defendant in error confidently asserts that the Supreme Court of Iowa erred in holding that the State Court had jurisdiction to hear and determine this cause, in holding that the Circuit Court of the United States, in and for the Southern District of Iowa, had not passed upon the question of its jurisdiction, and in refusing to give force and effect to the finding of the said Circuit Court, and in refusing to give full force and effect to the judgment of that court; that the motion of plaintiff in error, asking for a dismissal of the cause, based upon the proceedings on removal, and the proceedings in the Circuit Court of the United States after removal, and the judgment rendered in said Circuit Court should have been sustained.

Respectfully submitted,

W. H. BREMNER,

F. M. MINER,

Attorneys for Plaintiff in Error.

(23,596)

Supreme Court of the United States.

OCTOBER TERM, 1914

No. 130.

IOWA CENTRAL RAILWAY COMPANY
Plaintiff in Error.

VS.

L. M. BACON, ADMINISTRATOR OF THE ESTATE OF MARTIN W. LOCKHART, DECEASED,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA

Brief and Argument of Defendant in Error

E. ELMER MITCHELL,
Solicitor Supreme Court U. S.
L. T. SHANGLE,
D. C. WAGGONER AND
J. N. McCOY, *of Counsel*

Due and legal service of within Brief and Argument is hereby acknowledged and accepted this.....day of December, 1914.

.....

Attorneys for Plaintiff in Error.

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STATEMENT OF THE CASE.

The Defendant in Error desires to controvert the statement of the Plaintiff in Error in certain particulars; The record does not show that the "Clerk of the District Court of Iowa filed in the office of the Clerk of the Circuit Court of the United States in and for the Southern District of Iowa a transcript of the record in said cause" as stated by plaintiff in error on page 3 of his argument. The only record relating to that fact is the evidence of L. E. Corlett, Clerk of the District Court of Iowa in and for Mahaska County, set forth on page 19 of the record of this cause in which he states as follows:

"I do not know whether the case of Bacon vs. The Iowa Central to which these entries refer was removed to the Federal Court in October, 1905. I remember certifying the case. IT WAS CERTIFIED ON THE 20TH DAY OF DECEMBER, 1905, AND FILED BY E. R. MASON, CLERK, ON MARCH 29TH, 1906. The fees for the Certificate and Transcript WERE PAID BY THE DEFENDANT COMPANY, DECEMBER, 19TH, 1905. * * * I did not have any order for the removal in the transcript. So far as I have been able to find, I did not have any order of removal of record or in any other way. I do not think the court made any order of removal."

On Sept. 19th, 1910 defendant in error filed an amended and substituted petition as shown on page 5 of the Record, and on the 6th day of Oct. 1910, at the instance of the defendant in the original cause (Plff. in Error) the Mahaska County District Court entered the following order:

"Now on this day this cause coming on for hearing on motion and application of defendant for removal of cause to the United States Circuit Court and said motion and application having been heard by the court and the court being fully advised in the premises, finds that the amount in controversy is less than $2,000.00 exclusive of interest and costs and therefore said motion and application are overruled and defendant excepts. Defendant is given ten days to plead." (See record page 7).

The defendant then filed his answer making a general denial, pleading contributory negligence and the Statute of Limitations, and praying THAT THE CASE BE DISMISSED UPON ITS MERITS. (See Record page 7).

After all the above pleadings had been filed by both plaintiff and defendant in the original action, the defendant (plaintiff in error here) brought to the notice of the trial court the ex-parte proceedings in the Federal Court by filing a motion to dismiss the cause and to strike from the files all the pleadings of the plaintiff filed in said cause subsequent to the 1st day of September, 1905. Said motion being based on the alleged proceedings in The United States Circuit Court. (See record pages 11 to 17). This motion was over-ruled and the cause went to trial resulting in a verdict of $850.00 for Plaintiff, (Record page 26). On March 10th, 1911, judgment was duly entered for said sum. The Defendant (Plaintiff in Error) on March 13th, 1911 filed a motion for a new trial upon the grounds;

1st—That the verdict is contrary to law.

2nd.—That the verdict is not sustained by sufficient evidence and is against the greater weight thereof.

3rd.—That the verdict is not supported by any legal evidence.

4th and 5th.—That the damages assessed are excessive.

6th.—That the court erred in excluding evidence of contributory negligence.

7th.—That the court erred in withdrawing from the jury the issue of the Statute of limitations as a defense.

8th.—That the court erred in giving certain instructions.

9th.—That the court erred in giving Instruction No. 2 (Upon the doctrine of the last fair chance).

10th.—That the court erred in the admission and exclusion of certain evidence.

In the same motion the defendant moved the court in arrest of judgment upon the following grounds;

1st.—The court erred in holding that the cause was not barred by the statute of limitations.

2nd.—The court erred in holding that the cause of action as set out in the amended petition was not barred.

3rd.—That the court erred in holding that the petition and amended petition were in effect parts of the same pleading and that the cause therefore was not barred.

4th.—That the court erred in holding that it had jurisdiction of the action after the same had been removed to the Federal Court, (Record pp 26-28).

Said motion for new trial and in arrest of judgment was over-ruled and an appeal was taken to the Supreme Court of Iowa and in said court was affirmed.

(See opinion Iowa Supreme Court, Record page 29 et seq.).

The Plaintiff in Error states on page 6 of his Brief and Argument that the questions to be determined by this court are:

1st.—Did the state court lose jurisdiction by reason of the removal to the United States Circuit Court?

2nd.—Were the proceedings had in the United States Circuit Court such as to constitute a determination by that court that it had jurisdiction?

3rd.—Is the effect of the action taken by the State Court a refusal to give proper recognition to a judgment of the Circuit Court of the United States?

The defendant controverts the above propositions and avers that the questions brought to issue by the writ of error in this case are;

1st.—Was the cause removable under the United States Statutes?

about midway of the crossing; that this is one of the most public crossings upon the public streets in the city of Oskaloosa, business houses both east and west of this crossing, and there being a constant stream of travel across said crossing at all times of the day and there is also an immense amount of switching and railway travel across said street, the switch yards and tracks of the defendant being both north and south of this crossing and engines and cars running over the said crossing almost constantly and because of these conditions great caution is required and should be exercised by the train men operating trains and engines across the said crossing; that the engineer and fireman were negligent in not looking, and if they had looked they might have avoided the accident; the said engineer and fireman were negligent in running at a high and dangerous rate of speed over said crossing at the time of the accident and the said engineer and fireman were also negligent in not sounding an alarm by blowing the whistle or ringing the bell while running over said crossing and approaching the same and had they done so the acci-
10 dent might have been avoided; that the deceased was proceeding in the exercise of due caution and the said accident was not caused by any negligence or want of care upon his part contributing to said injury but the said injury was caused solely by the negligence and want of care upon the part of the defendant and its agents and employees as above set forth and because of said negligence the engine ran over the said Martin Lockhart and caused his death; that said injury resulting in the death of said Lockhart occurred on or about the 17th day of April, 1905; that plaintiff's intestate at the time was an old man over sixty years old; that he was not blind, but his sight was impaired and he required no one to assist him to go around; that he crossed this crossing nearly every day for more than a year before the said accident; the plaintiff withdraws the statement in his original petition that "plaintiff's intestate was almost wholly blind" and corrects the same as heretofore set out herein; that the defendant was further guilty of negligence in that the watchman employed by it at the said crossing should have seen the deceased in time to have prevented the accident; that had said watchman been properly performing his duties he would have stopped plaintiff's intestate from crossing at the time; that this negligence and want of care on the part of the defendant's watchman in not warning the plaintiff's intestate that the engine had reversed and started back and that said engine was coming back was one of the causes that occasioned the said accident and the resulting injury and death of plaintiff's intestate; that the defendant through its agents and employees carelessly and negligently permitted and caused plaintiff's intestate to be run over and killed by its engine to plaintiff's damage in the sum of 1990 dollars which is now
11 due and wholly unpaid. Wherefore, plaintiff prays for judgment against the defendant for the sum of $1,990.00 and costs.

And on the 6th day of October, 1910, the court made the following

Order.

Now on this day this cause came on for hearing on motion and application of defendant for removal of cause to the United States Circuit Court and said motion and application having been heard by the court and the court being fully advised in the premises, finds that the amount in controversy is less than $2,000.00, exclusive of interest and costs and therefore said motion and application are overruled and defendant excepts.

Defendant is given ten days to plead.

And thereafter and on the 15th day of October, 1910, the defendant filed its

Answer,

as follows:

Now comes the defendant, the Iowa Central Railway Co., and in answer to the amended and substituted petition of the plaintiff, filed herein, states that it denies each and every allegation in said amended and substituted petition.

The said defendant for further and separate answer to the said amended and substituted petition, states that whatever damages or injuries the said decedent sustained by reason of the alleged acts of the defendant, the same were due to his own negligence, directly contributing thereto for which this defendant is not liable.

The said defendant for a further and separate answer to the said amended and substituted petition of the plaintiff filed herein,
12 states that the alleged cause or causes of action set out in the amended and substituted petition are barred by the statute of limitations, more than two years having elapsed since the said acts, charged in said amended and substituted petition are alleged to have been committed by the said defendant and the defendant pleads the statute of limitations as a full and complete defense to the said plaintiff's action as set out in the said amended and substituted petition.

Wherefore, by reason of the premises as are above set forth, the said defendant asks that the plaintiff's cause of action may be dismissed upon its merits and it have judgment against the plaintiff for its costs.

On the 6th day of December, 1910, the plaintiff filed an amendment to the petition to which the defendant duly filed an answer, and thereafter and on the 18th day of February, 1911, the plaintiff filed another amendment to the petition.

And thereafter and on the 20th day of February, 1911, the plaintiff filed an

Amended and Substituted Petition,

as follows:

Comes now the plaintiff herein, leave of court having been first obtained, and files this his amended and substituted petition:

Plaintiff for cause of action states: That he is the duly appointed administrator of the estate of Martin W. Lockhart, deceased. That the defendant is a corporation organized under the laws of the state of Illinois and authorized to do business in the state of Iowa,
13 and that said defendant is engaged in the operation of a railroad through the city of Oskaloosa, Iowa, and across High avenue, a street in said city.

That High avenue is one of the paved streets of the city of Oskaloosa; that where the said railway crosses said High avenue, the defendant has five tracks, which with the spaces within said tracks cover and occupy the whole of Kossuth street running north and south at this point. That High avenue is paved and has cement sidewalks occupying the said street up to the intersection on both sides of the railway, and that the defendant maintains a permanent crossing at said intersection for the benefit of the public. That High avenue is the most public thoroughfare in the city of Oskaloosa and it is the main and central crossing for the people of the city and of the country lying southwest, west, north and northwest of said point, that hundreds of teams and foot passengers pass and re-pass there daily, and because of these conditions, great caution is required and should be exercised by the trainmen operating engines across the said crossing.

That on or about the 17th day of April, 1905, the plaintiff's intestate was walking to the west along the north sidewalk on High avenue west, and as he approached the defendant's tracks at the said intersection of Kossuth street and High avenue, one of defendant's engines and tender passed over the north sidewalk crossing going south, and after said engine had passed to the south over the crossing, this plaintiff's intestate then proceeded to cross the said tracks, proceeding with due care and caution, and when he had passed over the main line of said tracks and had got about midway of the second track, defendant's employees without giving any warning by sound of whistle or ringing of the bell suddenly started said engine
14 to the north, and carelessly and negligently struck plaintiff's intestate, knocking him down and running over him with said engine, causing his death.

That plaintiff's intestate did not know that said engine was going to run back to the north, that defendant's employees on starting said engine back towards the north and across this crossing, did not ring the bell, made no outcry and did nothing to apprise him that said engine was approaching. That said employees, knowing the publicity of said crossing and the danger to pedestrians and others at this point, were careless and negligent in backing the said engine without looking or paying any attention whatever to what they were doing, and that they negligently and without regard for this plaintiff's intestate's rights or his safety, backed said engine upon him

and over him, causing his death; that if the said employees, whose duty it was to operate said engine, had been using ordinary care they could have seen and it was their duty to have seen the danger of deceased; that they carelessly and negligently failed to give any attntion to what they were doing or to where they were going and could have easily stopped said engine before the injury occurred had they been using ordinary care in the manner of operating said engine. That after they should have known and it was their duty to have known of deceased's danger, they carelessly and negligently backed said engine over plaintiff's intestate, causing his death. That defendant's employees in charge of said engine at the said time, saw plaintiff's intestate and knew of the fact that he was in peril, or might have known of said fact, after they saw him by the use of ordinary care, and thereafter failed to use ordinary care to stop and prevent the said injury sustained by plaintiff's intestate, the
15 duty of defendant's employees operating said engine required them to stop whenever danger was threatened to plaintiff's intestate, whether he was on the track, near to it, or approaching it. That defendant's employees negligently failed to see deceased's danger which in the use of ordinary care they might have seen in time to have avoided said injuries and death; that in the use of ordinary care they might have so seen his danger, they might and should have given him warning and might and should have stopped said engine before it struck and run over him; that defendant's employees after they might have so seen his dangerous position, negligently failed to give this plaintiff's intestate any warning and neglected to stop said engine before it so run over him and negligently failed to save him from harm which they might have done by the use of ordinary care.

That the defendant company maintained a flagman at this crossing whose duty it was to warn pedestrains, and those driving teams across said crossing of the approach of trains and engines and of danger in crossing said crossing. That on the day of the said injuries in question the defendant company had a flagman at this point, that said flagman saw, or should have seen, this plaintiff's intestate approaching the crossing and negligently failed to give him any warning, knowing and seeing his danger, or could have seen his danger, and it being the flagman's duty to see his danger, negligently failed to give him any warning, and negligently permitted him to go upon said crossing without giving him any warning.

That defendant was further guilty of negligence in this by violating and disobeying Ordinance Number 76 of the ordinances of the city of Oskaloosa, Iowa, said ordinance providing that said company should maintain proper gates at said crossing for the safety
16 of the traveling public using said crossing, and defendant did not provide or maintain any gates as provided by said ordinance, a copy of which is hereto attached and marked Exhibit "A" and made a part of this petition.

That defendant was further guilty of gross negligence in immediately reversing its engine and running said engine back over the said crossing without giving time for persons who had started to

cross said crossing after the engine had passed to the south over said crossing, and in not giving time for this plaintiff's intestate to have crossed said crossing after said engine had passed over same to the south, that the defendant's employees operating said engine were negligent in reversing said engine and starting same back to the north without giving time for this plaintiff's intestate to cross over said crossing, and to start said engine back without giving any warning to him or ringing the bell and that the watchman or flagman was negligent in not properly warning him of the approach of said engine.

That defendant, well knowing the public use of said crossing, and well knowing of the many people who continually used said crossing, was guilty of gross negligence in backing said engine over said crossing, without having a switchman, brakeman, look-out or other person to look out for persons about to cross or crossing said track, to warn them of danger and to keep the trainmen advised as to the situation, so that the engine might be stopped or so run as to avoid injury to pedestrains, this plaintiff's intestate and others. That defendant was negligent in having no switchman, brakeman, look-out or other person on the rear of said engine as same backed over said crossing, as provided by its rules, in this regard and for the safety of those using said crossing, the defendant well knowing
17 the publicity of said crossing and the danger to pedestrains and others at said point.

That plaintiff's intestate was proceeding in the exercise of due care and caution and was wholly without fault at the time of the said injuries and in no way contributed thereto. That said injuries and death *was* caused solely by the negligence and want of care upon the part of the defendant and its agents and employees as above set forth, and because of said negligence as above set forth, said injuries resulted, causing the death of this plaintiff's intestate.

That plaintiff's intestate at the time of the said injuries was a man around sixty years of age, and his eyesight was slightly impaired, but not to such an extent that he was not able to get around without assistance; that he had used this crossing nearly every day in going to and from town for the year before his death; that in using said crossing he did so with due care and caution and was so using the same at the time of his injuries and death. And that his income, pension and earnings, at said time were around ($500.00) five hundred dollars a year.

That defendant, through its agents and employees, carelessly and negligently permitted and caused plaintiff's intestate to be run over and killed by said engine, and that by reason of the premises and the said negligent acts of the said defendant, this plaintiff was injured and damaged in the sum of $1,990.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of $1,990.00 and for costs.

18 EXHIBIT "A."

Ordinance No. 76.

An Ordinance Providing for the Public Safety and Convenience at Railway Crossings.

Be it ordered by the City Council of the city of Oskaloosa.

SEC. 1. That the Iowa Central Railway Company is hereby required to erect and maintain gates at the intersection of their road with West High avenue in the city of Oskaloosa. Said gates to be constructed and in operation on both intersections within thirty days after the passage of this ordinance, and after the passage of this ordinance the city clerk shall cause notice of the same and a copy of the ordinance to be served on the agent of said Iowa Central Railway Company in Oskaloosa, Iowa.

SEC. 2. Said gates shall be constructed so as to constitute when closed a complete barrier across the entire street to the passage of persons or teams upon or across said intersections and it shall be the duty of said company to keep the gates at its road at the places specified in this ordinance closed at all times when any cars or engines are passing said street upon its road.

SEC. 3. It shall be the duty of said railroad to keep said gates open to the free passage of persons and teams except when trains or the engines are passing the said street, said gates shall be opened immediately after the passage of each train or detached engine or car or cars, and provided, further, that only one train shall be permitted to pass at any one closing of the gates.

SEC. 4. That said company failing or neglecting to erect, maintain, or operate said gates as provided in this ordinance or failing to comply with any of the provisions of this ordinance shall
19 be deemed guilty of misdemeanor and for each offense shall be fined not to exceed twenty dollars and each day of the continued neglect or violation of this ordinance shall be deemed a separate offense.

And thereafter and on the 28th day of February, 1911, the defendant filed its

Motion to Dismiss and to Strike

as follows:

Now comes the defendant, Iowa Central Railway Company, and moves the court to dismiss the plaintiff's alleged cause of action and strike from the files of this court, the pleadings of the plaintiff filed in this cause since the 1st day of September, 1905, and marked filed Sept. 19, 1910, Dec. 6, 1910, Feb. 18, 1911, and Feb. 20, 1911, and assigns the following grounds therefor:

First, that defendant on the 2nd day of October, 1905, and prior to filing any plea therein, filed its petition and bond for removal of same to the Federal Court at Des Moines, Iowa, both properly exe-

cuted and same was transferred to said court, properly docketed therein and on the 11th day of May, 1909, said cause was dismissed by said Federal Court for want of prosecution.

Second, that all pleadings filed in this cause have been so filed since said removal and docketing and order of dismissal as aforesaid in the Federal Court and are amendments to or amended and substituted petitions in said cause to and for the original petition or the various amended and substituted petitions so filed and this court was and is without authority to permit such pleadings to be filed and is without jurisdiction or authority to hear and determine
20 said cause thereon for the reason the jurisdiction to hear and determine said cause had passed to the Federal Court and could only be again vested in this court by the Federal Court remanding the same to it, which was not done, or by plaintiff dismissing the same and bringing an original action to this court, which was not done.

In support of said motion, the defendant attaches hereto a certified copy of the records in said cause in the Federal Court and marks the same Exhibit "A" and makes same a part of this motion.

Third, the defendant subject to its ruling upon the motion to strike the plaintiff's pleadings from the files and dismiss said cause of action, further moves the court to require the plaintiff to select upon which petition and amendment thereto, if any, or its so-called amended and substituted petition, said cause is to be tried and to identify the same by the date or dates of the filing of the same in the clerk's office of this court, for the reason that said plaintiff has filed three separate amendments and three separate so-called amended and substituted petitions.

Fourth, for the further reason that the defendant, nor the court can determine upon which one of the said pleadings the case is to be tried, without compelling said plaintiff to make his election, before said trial begins.

Filed Feb. 28, 1911.

EXHIBIT A.

The petition, original notice, answer, bond for costs and petition for removal which formed a part of Exhibit A, attached to the motion and which are referred to in the following certificate of Cliff B. West, clerk of the District Court, and which are also referred to in the certificate of William C. McArthur, clerk of the
21 Circuit Court of the United States for the Southern District of Iowa, which certificates form a part of Exhibit A, are identical with the petition, answer, original notice, petition for removal and bond for costs heretofore set out in this abstract.

The balance of Exhibit A is as follows:

STATE OF IOWA,
Mahaska County, ss:

I, Cliff B. West, Clerk of the District Court in and for said County, in the state aforesaid, do hereby certify the foregoing to be a true, perfect and complete copy of the petition, original notice, answer, bond for costs and petition for removal filed in the above entitled cause, as the same appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Oskaloosa, Iowa, this 20th day of December, A. D. 1905.

[SEAL.] (S'g'd) CLIFF B. WEST, *Clerk,*
By L. E. CORLETT, *Deputy.*

STATE OF IOWA,
Mahaska County, ss:

I, W. G. Clements, Judge of the District Court, do hereby certify that Cliff B. West, whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of signing and sealing the same, clerk of the District Court of Mahaska County aforesaid, and keeper of the records and seal thereof, duly elected and qualified to office; that full faith and credit are, and of right ought to be given to all his official acts as such, in all courts of record and elsewhere, and this his said attestation is in due form of law, and by the proper officer.

22 Given under my hand this 20th day of December, A. D. 1905.

(S'g'd) W. G. CLEMENTS,
Judge of the Sixth Judicial District of Iowa.

STATE OF IOWA,
Mahaska County, ss:

I, Cliff B. West, Clerk of the District Court, in and for said County, in the State aforesaid, do hereby certify that W. G. Clements, whose genuine signature appeared to the foregoing certificate, was at the time of signing the same Judge of the District Court of the Sixth Judicial District of Iowa, duly commissioned and qualified, that full faith and credit are, and of right ought to be given to all his official acts as such, in all courts of record and elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Oskaloosa, Iowa, this 20th day of December, A. D. 1905.

[SEAL.] (S'g'd) CLIFF B. WEST, *Clerk,*
By L. E. CORLETT, *Deputy,*

(Endorsed:) Filed Mar. 29, 1906, E. R. Mason, Clerk.

In the Circuit Court of the United States for the Southern District of Iowa, General Division.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased, Plaintiff,
vs.
IOWA CENTRAL RAILWAY COMPANY, Defendant.

23 *Answer.*

Comes now the defendant and for answer to plaintiff's petition, denies each and every allegation therein contained.

For second and additional answer defendant says, that the accident mentioned in the petition and all of the injuries, if any, sustained by the plaintiff's intestate, were caused by and resulted from his failure to exercise due, proper and ordinary care for his own safety, and that the negligence of the plaintiff and his failure to exercise due, proper and ordinary care for his own safety contributed to and caused the accident and injuries alleged in the petition.

Wherefore, the defendant asks judgment for costs.

(S'g'd) GEORGE W. SEEVERS,
(S'g'd) JOHN I. DILLE,
Attorneys for Defendant.

(Endorsed:) Filed Mar. 29, 1906, E. R. Mason, Clerk.

And thereafter, to-wit: On May 9th, A. D. 1906, an order of continuance was ordered in said cause in words and figures following, to-wit:

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,
vs.
IOWA CENTRAL RAILWAY CO.

24 It is hereby ordered that this cause be continued generally.
(Recorded.)
(Recorded T. Page 218.)
(S'g'd) SMITH McPHERSON, *Judge.*

And thereafter, to-wit: On Dec. 5, 1906, an order of continuance was ordered in said cause in words and figures following, to-wit:

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,
vs.
IOWA CENTRAL RAILWAY COMPANY.

It is hereby ordered that this cause be continued generally.
(Recorded.)
Record U. Page 29.
(S'g'd) SMITH McPHERSON, *Judge.*

And thereafter, to-wit, on May 29, 1907, an order of continuance was ordered in said cause in words and figures following, to-wit:

25 In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,
vs.
IOWA CENTRAL RAILWAY COMPANY.

It is hereby ordered that this cause be continued generally.
(S'g'd) SMITH McPHERSON, *Judge.*

And thereafter, to-wit, on Dec. 5, 1907, an order of continuance was ordered in said cause in words and figures following, to-wit:

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,
vs.
IOWA CENTRAL RAILWAY COMPANY.

It is hereby ordered that this cause be continued generally.
(S'g'd) SMITH McPHERSON, *Judge.*

26 And thereafter, to-wit: On May 28, 1908, an order of continuance was ordered in said cause in words and figures following, to-wit:

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,

vs.

IOWA CENTRAL RAILWAY COMPANY.

It is hereby ordered that this cause be continued generally.

(S'g'd) SMITH McPHERSON, *Judge.*

And thereafter, to-wit: On Dec. 5, A. D. 1908, an order to notice for trial at next term or show cause why should not be dismissed was issued in said cause in words and figures following, to-wit:

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,

vs.

IOWA CENTRAL RAILWAY COMPANY.

This cause having this day been called and there being
27 no response from either side, and the same having been pending in this court for more than three years without any action by either party except to have the same continued.

It is now ordered that unless the same be noticed for trial at the next term of this court or good reason shown for not so doing that the same shall be dismissed for want of prosecution.

It is further ordered that a certified copy of this order be mailed by the clerk to the last known address of the attorneys for the parties to this cause.

(S'g'd) SMITH McPHERSON, *Judge.*

And thereafter, to-wit: On May 11, 1909, an order of dismissal was ordered in said cause in words and figures following to-wit:

In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

No. 3747. Law.

L. M. BACON, Administrator of the Estate of Martin W. Lockhart, Deceased,

vs.

IOWA CENTRAL RAILWAY COMPANY.

This cause came on this day for hearing, the defendant appeared by John I. Dille and plaintiff not appearing, the same was dismissed

at plaintiff's costs for want of prosecution. Thereupon it was
28 ordered that the defendant go hence without day and recover its costs taxed at — dollars and that execution issue therefor.

(S'g'd) SMITH McPHERSON, *Judge.*

UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

I, Wm. C. McArthur, Clerk of the Circuit Court of the United States for the Southern District of Iowa, hereby certify the above and foregoing to be a true, full and complete copy of the pleadings and record entries in the case of L. M. Bacon, administrator of the estate of Martin W. Lockhart, deceased, plaintiff, vs. Iowa Central Railway Company, defendant, No. 3747-Law, Central Division, in words and figures as follows, to-wit: Petition at Law; answer; original notice; petition for removal; bond for costs; certificate as to transcript from state Court; answer; order of continuance dated May 9, 1906; order of continuance dated Dec. 5, 1906; order of continuance dated May 29, 1907; order of continuance dated Dec. 5, 1907; order of continuance dated May 28, 1908; order to notice for trial at next term or show cause why should not be dismissed dated Dec. 5, 1908; order of dismissal dated May 11, 1909; as true, full and complete as the originals thereof filed and of record in my office in the city of Des Moines.

In witness whereof, I hereunto set my hand and affix the seal of said court at my office in the city of Des Moines in said District this 25th day of February, A. D. 1911.

[SEAL.] WM. C. McARTHUR,
Clerk of said Court.

29 And thereafter, and on the 3d day of March, 1911, the said motion to dismiss coming on to be heard, the following proceedings were had:

Plaintiff's Evidence.

C. E. CORLETT, called on behalf of the plaintiff testified as follows:

I am the clerk of the District Court in Mahaska county. I have before me district court record No. 29.

Q. You may now turn to the record in that book in the case of L. M. Bacon, administrator of the estate of Martin Lockhart, deceased, vs. Iowa Central Railway Company, at the October term, 1905.

A. This is at the October term, 1910.

Q. Is that the first record that appears in that case?

A. Yes, sir; I think it is.

Q. Have you examined the records of your office to see whether or not there is any other record?

A. I have had the deputy examine it.

Q. Where does this record appear?

A. It appears on October 6th, 1910.
Q. What book and what page of the book?
A. Page 588, book 29
Q. You may read that record?

Objected as immaterial, irrelevant and incompetent, the entry having been made more than four years after the case had been removed to the Federal Court, at Des Moines, Iowa, and when there was no such case pending in this court.

COURT: You say there is no other record?
A. Yes, sir; the deputy has searched the records and could find no other record.

30 COURT: You may read the record.
Defendant excepts.

"L. M. Bacon, administrator of the estate of Martin Lockhart, vs. Iowa Central Railway Company. No. 3144.

Now on this date, this cause came on for hearing on the motion and application of the defendant for removal to the United States Circuit Court, and the motion having been heard by the court and the court being fully advised in the premises finds that the amount in controversy is less than two thousand dollars, exclusive of interest and costs and said motion and application is overruled and the defendant excepts.

Defendant is given ten days to plead."

I do not find any other record of any character with reference to these parties to this action. The appearance docket shows that in October, 1910, a paper was filed marked answer. This paper was signed W. H. Bremner and John O. Malcolm, attorneys for defendant, and Geo. W. Seevers, general counsel. On December 17th, 1910, there was an answer filed signed by the same parties as attorneys for the defendant. There is an entry under date of December 7, 1910, in the same record as it appears at page 668, giving the defendant ten days to plead. There is no record showing any order made for removal. Exhibit A is a petition at law and is entitled L. M. Bacon, administrator, vs. Iowa Central Railway Company, filed September, 1905. I presume it is the original petition in this case. It was filed in this case.

Plaintiff offers in evidence Exhibit A, Robinson.

Objected to as immaterial and irrelevant. Overruled and the defendant excepts.

Plaintiff also offers the entries in Record Book 29, pages 588 and 668.

31 Objected to by the defendant as immaterial and irrelevant; that under the pleadings filed by the defendant, the case was removed to the Federal Court and any holding by this court that it was improperly removed would have no binding force or effect upon the defendant and for the further reason that the record discloses that this case was transferred to the Federal Court, by petition properly filed and by bond filed and that the Federal Court took jurisdiction of the case in October, 1905, and has never been remanded to this court.

Admitted subject to the objection.

Cross-examination:

I do not know whether the case of Bacon v. Iowa Central to which these entries refer was removed to the Federal Court in October, 1905. I remember of certifying the case. It was certified on the 20th day of December, 1905, and filed by E. R. Mason, clerk, on March 29, 1906. The fees for the certificate and transcript were paid by the defendant company December 19th, 1905. This case appears on the docket down to the October, 1905, term, at the time the petition for the removal of the case was filed. It next appears on the docket in September, 1910, when an amended and substituted petition was filed. I do not think the case was on my docket in the meantime for trial. To my recollection it did not appear on our printed dockets. Sometime in the last few months it was put back by Mr. Wagner who filed some of the papers. It never came back by being remanded. I have no record showing that it was ever sent back to this court. I would have a record of it if it had been and there is no such record

32 Redirect:

The transcript which I prepared contains all of the pleadings filed, the original notice, the petition for removal, the bond and order of removal. I certified to the clerk of the Federal Court the petition at law, the original notice and the return thereon, the answer, the petition for removal, the bond for costs and the certificate of the clerk and the judge. I did not have any order for removal in the transcript. So far as I have been able to find, I did not have any order for removal of record or any other way. I do not think the court made any order of removal.

Testimony upon motion closed.

And thereafter and on the 4th day of March, 1911, the court duly entered of record the following

Order.

Now on this day this cause came on for hearing on defendant's motion to dismiss and strike and the court being fully advised in the premises said motion of defendant to dismiss and strike is overruled and defendant excepts. It is conceded by all parties that this cause shall stand for trial on the substituted petition, filed by plaintiff on February 20, 1911. Defendant is given until Monday, March 6th, to plead.

And thereafter and on the 7th day of March, 1911, the plaintiff filed its

Amendment to Petition,

as follows:

Comes now the plaintiff and amends his amendment to petition filed February 20th, 1911, and strikes out the word "substi-
33 tuted" appearing therein. That it was the intention of plaintiff that said amendment should be an amendment to the

original petition filed in this case and not a substituted petition. That in compliance with defendant's motion to require plaintiff to elect upon which pleadings he relies plaintiff states that he relies upon the original petition filed in this case as amended by the amendment to petition filed February 20th, 1911, and that plaintiff will go to trial upon the said original petition and the said amendment of date of February 20th, 1911; as herein amended.

And on the 6th day of March, 1911, the defendant filed its

Answer to Amended and Substituted Petition

as follows:

Now comes the defendant, the Iowa Central Railway Company, and in answer to the amended and substituted petition of the plaintiff, filed Feb. 20th, 1911, states that it denies each and every allegation in said amended and substituted petition.

That the said defendant for further and separate answer to the said amended and substituted petition, states that whatever damages or injuries the said decedent sustained by reason of the alleged acts of the defendant, the same were due to his own negligence, directly contributing thereto for which this defendant is not liable.

The defendant for a further and separate answer to the said amended and substituted petition of the plaintiff filed February 20th, 1911, states that the alleged cause or causes of action set out
34–79 in the amended and substituted petition are barred by the statute of limitations, more than two years having elapsed since the said acts, charged in said amended and substituted petition, are alleged to have been committed by the defendant, or the appointment of plaintiff as administrator of said decedent, and the bringing of this action, and the defendant pleads the statute of limitations as a full and complete defense to the said plaintiff's action as set out in the said amended and substituted petition.

Wherefore, by reason of the premises as are above set forth, the said defendant asks that the plaintiff's cause of action may be dismissed upon its merits and it to have judgment against the plaintiff for its costs.

And on the 9th day of March, 1911, the plaintiff filed his

Reply

as follows:

Now comes the plaintiff and for reply to the answer and amendments thereto heretofore filed alleges that he denies each and every allegation contained in said answer and amendments thereto, not admitted as set out in the petition and amendments thereto and plaintiff demands judgment as in the original petition.

Bill of Exceptions.

And on the 6th day of March, 1911, this cause came on to be heard, and a jury being duly empaneled, the following proceedings were had:

80 * * * * * * *

It is agreed that Martin Lockhart was 68 years of age at the time of his death, and that his expectancy of life as shown by the table in the Code Supplement, page 316 was 8.753 years.

Testimony closed.

After argument of counsel the court gave to the jury the following

Instructions:

I.

Plaintiff brings this suit as administrator of the estate of Martin W. Lockhart, deceased, to recover from the defendant the sum of $1,990.00 damages caused by the death of said Martin W. Lockhart and for cause of action states in his original petition and amendments thereto that he is the duly appointed and qualified administrator of the said Martin W. Lockhart, deceased, that the defendant is a corporation organized under the laws of the state of Illinois and authorized to do business in this state and that defendant is
81 engaged in operating a railroad line through the city of Oskaloosa, Iowa, and across High avenue, a street in said city; that on or about the 17th of April, 1905, one of the defendant's engines and tender, manned by an engineer, fireman and brakeman, carelessly and negligently ran over plaintiff's intestate, on High avenue, west, while said intestate was walking on the sidewalk on the north side of said High avenue, inflicting injuries, which caused his death in a short time; that said injury occurred in the day time and in the presence of a large number of persons and in the presence of a flagman, maintained by the defendant at said crossing; that said flagman negligently permitted plaintiff's intestate to go upon said track without warning him of his danger; that said engineer and the firemen saw plaintiff's intestate upon said railway track, or could have seen him and negligently permitted him to be run over and killed by said engine; that plaintiff's intestate was almost wholly blind, and that the employees of the defendant, to-wit, the engineer, the fireman, the brakeman and the flagman, who were on duty on said engine and at said crossing, at the time, well knew said fact; that said engine was running at a slow rate of speed and could easily have been stopped before it struck plaintiff's intestate and plaintiff avers that defendant's employees negligently and carelessly permitted said Martin W. Lockhart to be killed, to the plaintiff's damage in the sum of $10,000.00.

That High avenue is one of the paved streets of the city of Oskaloosa and that where said railway crosses said High avenue, the de-

fendant has five tracks, which with the spaces between said tracks cover and occupy the whole of Kossuth street, running north
82 and south at this point; that High avenue has cement sidewalks on said street on the intersection, on both sides and that the defendant maintains a permanent crossing at said intersection for the benefit of the public. That High avenue is the most public thoroughfare in the city of Oskaloosa and is the central crossing for the people of the city and of the country, lying west, southwest, north and northwest of said point and that hundreds of teams and foot passengers pass and repass there, daily.

That about the 17th of April, 1905, plaintiff's intestate was walking west along the north side of High avenue west, on the sidewalk, approaching the defendant's track at said intersection of Kossuth street and High avenue, when one of the defendant's engines and tenders passed from the north side of said walk and crossing, going south and that when said engine had passed south over the crossing the plaintiff's intestate proceeded to cross said track and had passed over the main line of said tracks and was about midway of the second track when defendant's employees started said engine to the north and carelessly and negligently struck plaintiff's intestate, knocking him down and running over him with said engine, causing his death.

That the defendant's employees started said engine backwards and to the north and across the crossing negligently and without regard to the plaintiff's intestate's rights or safety and backed said engine upon and over him, causing his death and could easily have stopped said engine before said injury occurred, had they been using ordinary care.

That defendant's employees in charge of said engine at said time saw plaintiff's intestate and knew the fact that he was in
83 peril and thereafter failed to use ordinary care to stop and to prevent said injury sustained by plaintiff's intestate; that the duty of the defendant's employees required them to stop whenever danger threatened the plaintiff's intestate, whether he was on the track, near to or approaching it.

That the defendant company maintained a flagman at this crossing whose duty it was to warn pedestrians and those driving teams across said street of the approach of trains and of engines and of danger in crossing said crossing; that on the day of said injury the defendant had a flagman at said point and that said flagman saw plaintiff's intestate approaching said crossing and failed to give him any warning when he saw his danger but negligently permitted him to go upon said crossing without giving him any warning.

That said injuries and death *was* caused by the negligence and want of care upon the part of the defendant and its agents and employees as above set forth.

That plaintiff's intestate at the time of said injuries was a man around sixty years of age; that his eye sight was slightly impaired but not to such an extent but that he was able to get around without assistance; that he had used this crossing nearly every day in going to and from town for the year before his death; that his income, pension and earnings at said time were around $500.00 a year.

That by reason of said premises and the said negligent acts of the defendant, the plaintiff has been damaged in the sum of $1,990.00.

Wherefore, he prays judgment against the defendant in the sum of $1,990.00 and costs.

84 The defendant by answer and amendment admits that it is a corporation, organized and existing under the laws of the state of Illinois and engaged in operating a railway running through the city of Oskaloosa, state of Iowa. Admits that the plaintiff's intestate, Martin W. Lockhart, was wholly blind but specifically denies each and every allegation in plaintiff's petition and amendments and demands that plaintiff's action be dismissed upon its merits and that *he* have judgment against the plaintiff for costs.

All other allegations of facts and issues presented by the pleadings, are by the court withdrawn from your consideration.

No. 2.

Under the issues thus presented by these pleadings the burden of proof is upon the plaintiff, and before you can return a verdict for the plaintiff, he must establish by a preponderance of the evidence:

First. That defendant was guilty of negligence in some one or more of the particulars charged in his petition, as set out in instruction No. 1 hereof, and that said negligence caused the alleged injury and death of plaintiff's intestate, Martin W. Lockhart.

Second. That defendant, through its employees, actually knew that plaintiff's intestate, Martin W. Lockhart, was in peril, in time to have avoided injuring him, by the exercise of reasonable care, and failed to avoid the injury.

It is not sufficient for the plaintiff to show that defendant's negligence caused the injury and death of Martin W. Lockhart, but he must further show by a preponderance of the evidence that the defendant had knowledge of the danger said Martin W. Lock-

85 hart was in for a sufficient length of time before the injury was inflicted, so that by the exercise of reasonable care on the part of defendant's employees the injury might have been avoided.

If he has established by a preponderance of the evidence these facts, that is; that defendant was guilty of negligence which caused the injury and death of said Martin W. Lockhart, and that defendant had actual knowledge of said Martin W. Lockhart's peril, in time to have avoided injuring him by the exercise of reasonable care and failed so to do, you should find for the plaintiff; but if he has failed to show by a preponderance of the evidence that defendant was guilty of negligence which caused the injury and death of said Martin W. Lockhart, or failed to show, by a preponderance of the evidence that defendant had actual knowledge of said Martin W. Lockhart's peril in time to have avoided injuring him by the exercise of reasonable care, you should find for the defendant.

No. 3.

By the term, "a preponderance of the evidence," as used in these instructions, is meant evidence of greater weight, or evidence more satisfactory and convincing in its character.

No. 4.

Negligence is defined to be the doing of something which a reasonably prudent person would not do under the same or like circumstances, or the omission to do something which such a reasonably prudent person would not under the same or like circumstances omit to do.

No. 5.

86 The issue of contributory negligence on the part of plaintiff's intestate having been withdrawn from the jury, you are instructed that you need not consider or determine whether or not plaintiff's intestate, Martin W. Lockhart, was guilty of negligence, or failure to exercise ordinary care, in going upon the railway crossing and placing himself in the situation in which he was at the time of the alleged injury. For, notwithstanding he may have been negligent up to the instant of the accident, if the defendant had actually discovered his peril and appreciated, or ought to have appreciated the danger, and by the exercise of ordinary care could have avoided the injury, the defendant is liable and your verdict should be for the plaintiff. But unless you find from a preponderance of the evidence that defendant did have actual knowledge of deceased's peril in time to avoid the injury by the exercise of reasonable care, your verdict should be for the defendant.

No. 6.

You are instructed, that in determining whether defendant's employees had actual knowledge of deceased's peril in time, by the exercise of reasonable care to have avoided the alleged injury, and as bearing upon this question of actual knowledge, you should consider the situation of deceased and also the situation of the engineer, fireman and flagman, and the things done and said by them, as shown by the evidence, at and about the time of the alleged injury; and all the circumstances and conditions surrounding the transaction and persons connected therewith at and about the time of the alleged injury, as shown by the evidence, should be considered by you, as bearing upon this question.

87 No. 7.

You are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight you should take into consideration the conduct, appearance and demeanor of the witnesses while testifying; his apparent candor, or want of it; his bias and feeling or the absence of it; his interest or lack of interest in the result of the trial; his relationship, or non-relationship to those who are thus interested; his means of knowledge of the things about which he has testified; the reasonableness or unreasonableness of the story told and from these and all

other facts and circumstances, disclosed by the evidence, as surrounding the witness or his testimony, in the light of your own good common sense and knowledge of men and things, give to the testimony of each witness such weight and credit as you believe it fairly entitled to, and no more.

No. 8.

If under the evidence and instructions of the court, you find for the plaintiff, you will then proceed to determine from the evidence and assess the amount of his recovery, and the measure of such recovery, if any, will be the present worth or value of the estate which the said Martin W. Lockhart would reasonably be expected to have saved and accumulated if he had lived out the natural term of his life.

The measure of recovery in cases of this kind is not the sum which placed at interest will yield an amount equal to the income of deceased at the time of his death, nor the amount necessary for his support, but it is that amount estimated at its present
88 worth, which under all the circumstances disclosed in the evidence, you believe would have come to his estate at the end of his natural life.

In estimating such damage, if any, you award plaintiff, you should consider, so far as shown by the evidence, the age of said Martin W. Lockhart at the time of his death, his income from the pension or otherwise at the time of his death; his bodily health; his habits of thrift, or otherwise, if any have been shown; the contingencies of life, such as ill health, advancing years and consequent increase or decrease of expense of living, and all the facts and circumstances in evidence, tending to show the amount, if any, that the estate might have accumulated had he lived out his natural life, and award the plaintiff such sum as you believe, from the evidence, under the rules herein stated, will be a fair and reasonable compensation for loss sustained by the estate of said Martin W. Lockart, as a result of his death, not to exceed the sum claimed, $1990.00.

No. 9.

If you find for the plaintiff you are instructed that in arriving at your verdict, it will not be proper for you to agree that you will abide by a verdict obtained by each of you setting down the amount he may consider the plaintiff entitled to, and then add the several amounts together and divide by twelve and return the result as your verdict.

Such a verdict would be known as a quotient verdict and would not be permitted to stand under the law.

No. 10.

If you find for the plaintiff the form of your verdict will be "we, the jury, find for the plaintiff and assess the amount of his
89 recovery at $..... (inserting the amount). If you find for the defendant you will say "We, the jury, find for the defendant."

Two forms of verdict are hereto attached. When you have agreed, you will cause the verdict agreed upon to be detached, and if your verdict is for plaintiff, after filling in the amount, you will cause the verdict to be signed by one of your number as foreman, and returned with these instructions into court.

JNO. F. TALBOTT, *Judge.*

And thereafter and on the 11th day of March, 1911, the jury returned the following

Verdict.

"We, the jury find for the plaintiff and assess the amount of his recovery at eight hundred fifty ($850.00) dollars."

And thereafter and on the 13th day of March, 1911, the defendant filed its

Motion for a New Trial

in words and figures, as follows:

The defendant moves the court for a new trial in this cause and to set aside the verdict and judgment and for new trial thereof and in arrest of said judgment and assigns the following grounds therefor:

First. Said verdict is contrary to law.

Second. The verdict is not sustained by sufficient evidence and is against the greater weight thereof.

Third. The verdict is not supported by any legal evidence
90 in that the pension certificate introduced in evidence is not sufficient to show that the plaintiff's intestate would or could have saved anything over and above said pension, after paying the expense of his living and proper care and support and that said certificate and the pension received thereunder of itself, determines that the amount named therein is required for the proper care and support of said decedent and is not intended that any portion thereof should go to the estate of said decedent and is evidence that the whole thereof was necessary for his support.

Fourth. That the damages assessed by said verdict are excessive and that the only evidence to support the same is the pension certificate, showing that decedent was receiving at the time of his death, the sum of fifty dollars ($50.00) per month. The uncontradicted evidence shows that said decedent was almost wholly blind, sixty-eight years of age and was incapable of earning any money or taking care of business.

Fifth. That the entire income of said decedent from all sources was the said pension of $50.00 per month and that all the same was necessary for the proper care and support of said decedent and that his expectancy at the age of sixty-eight years was eight and three-fourths years.

Sixth. The court erred in excluding from the consideration of the jury all evidence as to the negligence of the intestate contribut-

ing to the injury, causing his death and withdrawing from the consideration of the jury the negligence of said intestate directly contributing thereto.

Seventh. The court erred in its statement of the issues to the jury in instruction No. 1 by omitting therefrom the defense of the limitation of the statute pleaded by the defendant as a full
91 and complete defense to said action and in withdrawing from the consideration of the jury the issue of the statute of limitations as thus pleaded and the further defense of contributory negligence pleaded which contributory negligence defendant alleged in its answer caused the injury or at least contributed directly to the injury for which this action is brought.

Eighth. That the court erred in giving upon its own motion instructions in chief Nos. 2, 5, 6 and 8.

Ninth. The court erred in giving instruction No. 2 in stating to the jury that plaintiff could recover damages against the defendant, notwithstanding the negligence of the plaintiff's intestate directly contributing thereto and in omitting and failing to instruct the jury that if, at the time of the accident and injury to the plainiff's intestate, both he and the defendant were negligent and that such joint negligence caused the injuries complained of, that the same would be concurrent and the defendant would not be liable to the plaintiff's intestate therefor.

Tenth. The court erred in the admission of evidence, duly objected to by the defendant and in the exclusion of evidence offered by the defendant all of which is fully shown by the shorthand reporter's notes, which were, by order of the court, made a part of the record in this cause.

The defendant further moves the court to arrest the judgment in this cause and assigns the following grounds therefor:

First. The court erred in holding that plaintiff's cause of action was not barred by the statute of limitations in this, more than two years elapsed from the bringing of the action and the filing by plaintiff of his first amended and substituted petition, September 28, 1910.

a. The original petition, filed September 22nd, 1905, in
92 said cause, failed to state a cause of action against the defendant in this, it omitted to allege intestate's freedom from contributory negligence to the injury complained of.

b. The second amended and substituted petition was filed February 20th, 1911, and set up new causes of action all of which were barred by the statute of limitations, more than two years having elapsed since the bringing of said action and the filing of the original petition, September 22, 1905, and February 20, 1911; that said original petition was superseded by the filing of the first amended and substituted petition September 28, 1910, and it was superseded by the second amended and substituted petition, filed February 20, 1911, and that said amended and substituted petitions, so filed more than two years after the bringing of said action and the filing of said original petition, would not relate back to, nor incorporate into them or either of them the original petition, so as to make the same a part thereof and the statute of limitations fully applied to both of

the said amended and substituted petitions and to the acts of negligence charged therein.

Second. That the court erred in holding that plaintiff's alleged causes of action, as set out in said amended and substituted petitions, were not wholly barred by the statute of limitations and further erred in holding that said original petition was a part of the pleadings in said cause, notwithstanding the filing of the alleged amended and substituted petitions.

Third. The court further erred in permitting any allegations made in the original petition to become a part of the amended and substituted petition as the alleged causes of action set out
93 therein were barred by the statute of limitations and the original cause of action superseded and abandoned by the filing of the amended and substituted petitions.

Fourth. The court erred in holding that it had jurisdiction of the parties and subject matter of this suit, the same having been transferred to the Circuit Court of the United States at Des Moines, Iowa, and was never remanded back to this court for trial.

And thereafter and on the 10th day of March, 1911,

Judgment

was duly entered of record in favor of the plaintiff and against the defendant in the sum of $850.00 and costs to which the defendant, at the time, duly excepted.

And thereafter and on the 7th day of April, 1911, the court entered and filed for record an order denying said motion for a new trial, to which ruling of the court the defendant, at the time, duly excepted.

Judge's Certificate.

At the trial of said action all of the proceedings, including the proceedings on the hearing on the motion of defendant to dismiss and to strike were duly taken down in shorthand by the official shorthand reporter of said court, and the said shorthand notes of said reported were duly certified to by him and by the trial judge, which certificate was to the effect that the said shorthand report is the report of the evidence in said action and contains, with the records,
94 exhibits and documentary evidence therein referred to and identified, all of the evidence offered, given or introduced in said action by the respective parties upon the trial thereof, all objections and motions of the parties thereto or any part thereof, all rulings by the court upon such objections and motions and all exceptions to such rulings and said report, with the certificate was ordered to be filed and made a part of the record and to constitute the bill of exceptions in this action, and the said shorthand notes so certified, were within the time required by law — with the clerk of said district court.

And thereafter the said official shorthand reporter made a transcript of his said notes duly certified to by him to be correct, which said transcript was on the 17th day of January, 1911, filed with the clerk of said district court.

Appeal.

On the 12th day of June, 1911, the defendant perfected its appeal to this court from the judgment of the said district court, as aforesaid, by serving a written notice of appeal on the attorneys for the plaintiff and upon the clerk of the district court in and for Dallas county, which said notice of appeal was filed in the office of said clerk on the 26th day of May, 1911, and securing to said clerk his fees for a transcript.

Attorney's Certificate.

The foregoing abstract of record contains all of the pleadings, and papers filed in said cause; all of the evidence introduced upon the trial thereof; all of the evidence offered; all objections made thereto, together with the rulings of the court thereon and the exceptions thereto, and is a full, true and complete record of all proceedings had in said case.

95–113

W. H. BREMNER,
JNO. O. MALCOLM,
Attorneys for Appellant.

GEO. W. SEEVERS,
Of Counsel.

I hereby certify that the cost of printing the foregoing abstract is $73.50.

W. H. BREMNER,
Attorney for Appellant.

* * * * * * *

114 In the Supreme Court of Iowa.

(Filed Oct. 22, 1912.)

28514.

L. M. BACON, Administrator, Appellee,
vs.
IOWA CENTRAL RAILWAY COMPANY, Appellant.

Appeal from the District Court of Mahaska County.

John F. Talbott, Judge.

Action for damages resulted in judgment against the defendant, from which it appeals.

George W. Seevers, W. H. Bremner, and John O. Malcolm for Appellant.

John McCoy, L. T. Shangle, J. B. Bolton and D. C. Waggoner, for Appellee.

LADD, *J.*:

This action was begun September 20, 1905, by the service of an original notice, in which the claim was said to be $10,000. In the petition, filed two days later, plaintiff alleged that "the defendant's employés negligently and carelessly permitted the said Martin W. Lockhart to be killed, to the plaintiff's damage in the sum of $10,000," but demanded judgment for $1,990.00 only. The defendant filed and answer on September 30, 1905, admitting its corporate existence and that the plaintiff's intestate was blind, and denying all other allegations of the petition. It filed a petition for removal to the circuit court of the United States February 2, following, therein averring diverse citizenship and that the amount in controversy, exclusive of all interest and costs, exceeded $2,000; and also a bond approved by the clerk of the district court of Mahaska county. This petition was not presented to the district court, nor, so far as appears, was its attention directed thereto, prior to October 6, 1910. Notwithstanding this the clerk of the district court made out and certified a transcript of the papers on file and proceedings, which was filed in the circuit court of the United States March 29, 1906. The record does not indicate that plaintiff ever appeared in that court, but several orders continuing the cause were
115 entered of record, and on December 5, 1908, an order "that unless same be noticed for trial at the next term of this court, or good reason shown for not so doing, the same shall be dismissed for want of prosecution." At the May, 1909 term of that court the cause was so dismissed at plaintiff's costs. In the meantime the case had not been placed on the printed docket of the district court of Mahaska county, but after the dismissal in the Federal court, and on September 19, 1910, an amended and substituted petition was filed, in which the judgment prayed was the same as in the original petition, and on October 6 following the petition for removal was overruled. Nine days later the defendant filed an answer thereto denying the allegations of the amended and substituted petition and pleading contributory negligence and the statute of limitations. Later a second amended and substituted petition, with prayer as before stated, was filed, and defendant moved that the cause of action be dismissed and the two petitions last filed by plaintiff stricken from the files, on the ground that said cause had been transferred to the federal court and there dismissed. This motion was overruled and trial thereafter was had on the merits.

I.

The point first made is that the amount in controversy exceeded two thousand dollars, and for this reason the court erred in overruling the petition for removal to the federal court. While conceding

that the prayer was for a judgment of less than two thousand dollars, it is argued that inasmuch as the petition alleged the damages to be $10,000 it, rather than the prayer, should control, relying on Section 3775 of the Code, which declares that "The relief granted to plaintiff if there be no answer, cannot exceed that which he has demanded in his petition; in any other case the court may grant him any relief consistent with the case made by the petition and embraced within the issues." It may be conceded that there are authorities which seem to hold that under like statute the prayer for relief becomes wholly immaterial after an answer has been filed. See

Marquat vs. Marquat, 12 N. Y. 336.
1 Bates' Pleading, etc., 315.

An examination of these cases, however, discloses that the reasoning in each is broader that the decision. Thus, in Marquat vs. Marquat, the action was for the specific performance of an agree-
116 ment to execute a mortgage, to secure a note, and for other relief. The defendants answered denying any agreement to execute a mortgage, but alleging that the plaintiff merely loaned them money. The court denied specific performance, but entered judgment for the amount due on the note. Other decisions are to the effect that the prayer for relief forms no part of the petition, and hence that its sufficiency and character must be determined from the facts stated rather than from the prayer for relief.

Henry v. McKittrick, 42 Kansas, 485.
Tiffin Glass Co., vs. Stoehr, 54 Ohio St., 157.

In actions like this the damages are unliquidated and a prayed for judgment in a sum less than the damages alleged is equivalent to a remittance or waiver of the difference. Dillon in his work on Removal of Causes, Sec. 93 says: "The value of the matter in dispute, for the purpose of removal, is to be determined by reference to the amount claimed in the declaration, petition or bill of complaint." Of course this will not control when the allegations of the petition disclose the amount in controversy to be less than that for which judgment is prayed.

1 Ency. Pl. & Pr. 712.
Garman vs. Harvid, 141 U. S. 206.

And the sum for which judgment is prayed *id* determinative of the amount in controversy with reference to the right of appeal.

Hiatt vs. Nelson, 100 Iowa, 750;
Nash vs. Beckman, 86 Iowa, 249;
Cooper vs. Dillon, 56 Iowa, 367.

"In all actions sounding in damages the plaintiff is limited to his demand therefor in his declaration or complaint, and can recover no more than the amount specified."

5 Ency. Pl. & Pr. 712.

Our statute requires the petition to contain "a demand of the relief to which the plaintiff considers himself entitled, and if for money, the amount thereof," and the rule prevails in this state under the statute first quoted that the court may not grant relief other than that prayed unless included therein, or enter judgment or decree different from, unless equivalent to, that demanded.

Bottorff vs. Lewis, 121 Iowa, 27;
Brown vs. Kiel, 117 Iowa, 316;
Rees vs. Shepherdson, 95 Iowa, 431;
Marder vs. Wright, 70 Iowa, 42;
117 Tice vs. Derby, 59 Iowa, 312;
Lafever vs. Stone, 55 Iowa, 49;
O'Connell vs. Cotter, 44 Iowa, 48.

See also,

Winney vs. Sandwich Mfg. Co., 86 Iowa, 608;
Johnson vs. Rider, 84 Iowa, 50;
Humphrey vs. Dagg, 1 Greene, 435.

Following these decisions we necessarily reach the conclusion that the amount in controversy was less than $2,000, the amount for which judgment was prayed, notwithstanding the allegation in the petition that the plaintiff had been damaged more than that sum.

As precisely in point see,

Stark vs. Port Blakely Milling Co., 44 Wash., 309; 87 Pac., 339.
Smith vs. Railway Co., 4 N. D., 33; 53 N. W., 173.
Lake Erie & W. Ry. Co. vs. Juday, 16 Ind. Appl., 436; N. E. 843.

II.

The amount in controversy then affirmatively appeared, from the pleading on file, to be less than $2,000.00, though the petition for removal asserted it to exceed that sum, and under the Act of Congress approved March 3, 1875, as amended by the Acts of Congress approved March 3 and August 13, 1887, the cause was not removable. Sec. 3 of the Act referred to provides: "That whenever any party entitled to remove any suit mentioned in the next preceeding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from the state court to the Circuit Court of the United States, he may make and file a petition in such suit in such state court * * * for a removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond with good and sufficient surety * * * It shall then be the duty of the said court to accept such petition and bond and proceed no further in such suit; and the said copy being entered as aforesaid in said Circuit Court of the United States, the case shall then proceed in the same manner as if it had been originally commenced in said Circuit Court."

The defendant filed a petition for removal, accompanied by a bond with the Clerk of the District Court, but does not appear to have directed the court's attention thereto, nor to have afforded it an opportunity to "accept the petition, It caused
118 transcript of the record to be filed in the Federal Court which however, never ruled on the question of whether it acquired jurisdiction. It merely entered orders continuing the case, and finally dismissed the same without ruling thereon, or on the merits.

Continuance orders were not inconsistent with the want of jurisdiction, for this simply postponed action of any kind touching the disposition of the case. Nor was the dismissal a bar to the prosecution of another action.

Gardner v. Michigan Cent. R. Co., 100 U. S. 349; 37 L. Ed., 1107.

It is not important then to consider the effect to be given to a judgment on its merits rendered in a Federal Court in a case removable thereto, but see

Des Moines Navigation Co. vs. Homestead, 123 U. S., 552, 559, and

Chesapeake & O. Ry. Co. vs. McCabe, 203 U. S., 207; 53 L. Ed., 765,

holding that such a judgment if unreversed, will support a plea in bar.

There was no adjudication of the right of removal by the United States Circuit court, and unless the cause was removable the District Court of Mahaska County was not required to yield jurisdiction upon the filing of the petition for removal. Of course, the record as made by the filing of such petition cannot be questioned in the state court, but if as thus made, it appears upon its face that the cause was not removable, it was not only the privilege, but the duty of the state court to retain jurisdiction, and to adjudicate the issues raised by the pleadings. In other words, the petition for removal, with the record as it appeared upon the filing thereof, presented a pure question of law as to whether removal had thereby been effected.

In Burlington, Cedar Rapids & Northern R. Co. versus Dunn, 122 U. S. 513, 30 L. Ed., 1159, Chief Justice White, speaking for the court observed that "The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then to the state court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time,
119 that the petitioner is entitled to a removal of the suit. That question the state court has the right to decide for itself; and if it errs in keeping the case and the highest court of the state affirms its decision this court has jurisdiction to correct the error, consider-

ing for that purpose only the part of the record which ends with the petition for removal."

That court has repeatedly recognized the principle above stated, i. e. that the state court is not required to let go its jurisdiction until a case is mad*w* which, upon its face shows that the petitioner can remove the cause as a matter of right.

Pa. Co. vs. Bender, 148 U. S., 255; 37 L. Ed. 441;
Delaware R. Const. Co. vs. Meyer, 100 U. S. 457, 474; 25 L. Ed., 593, 599;
Powers vs. Chesapeake & O. R. Co., 169 U. S., 92; 42 L. Ed. 672.
Stone vs. South Carolina, 117 U. S., 430; 29 L. Ed., 962;
Yulee vs. Vose, 99 U. S., 545; 25 L. Ed., 356;
Nat'l Docks and N. J. Junct. Connect. Ry. Co. vs. Pa. R. Co., 28 At. 71.

The rule is well stated in Gregory vs. Hartley, 113 U. S., 746; 28 L. Ed., 1150: "The district court was not bound to surrender its jurisdiction until a case was made, which on the face of the record showed that the petitioners were in law, entitled to a removal. The mere filing of a petition was not enough unless, when taken with the rest of the record, it showed on its face that the petitioners had under the statute a right to take the case to another tribunal."

So that, notwithstanding the assertion in the petition for removal the amount in controversy exceeded two thousand dollars, this was clearly shown by the record to be untrue and the district court was not deproved of jurisdiction by the apparent attempt to take the case "furtively by a sort of statutory larceny" to the Federal court. Though the case had not been placed on the printed docket after the filing of the transcript in the Federal Court until the entry of dismissal there, it had not been dismissed in the state court. Nor does its omission from the docket appear to have been in pursuance of any order of the latter tribunal. It was still pending, notwithstanding the omission of the clerk, and upon the filing of the amended and substituted petition the court overruled the petition for removal. This asserted its jurisdiction at a time when first presented for its acceptance, and of which nothing had been done to deprive it.

Manifestly, the court retained jurisdiction of the cause and
120 there was no error in proceeding to determine the issues in the ordinary course of litigation.

The petition as first filed did not allege freedom from contributory negligence. It was amended in this respect more than two years afterward, and appellant contends that the plea of the statute of limitations should have been sustained. Cahill vs. Railway, 137 Iowa 577, decides otherwise, and the question is so fully discussed there that nothing need be added.

IV.

The issue of whether decedent was guilty of contributory negligence was withdrawn from the jury and appellant contends that the evidence was not such as to justify the submission of the cause under the doctrine of the last fair chance.

It appears that decedent stood near the crossing when the switch engine moved over the street to the south, where it coupled on to a car and immediately backed over the crossing running decedent down. The engineer and fireman testify that each had his head out of the cab looking north as the engine backed with the tender ahead. Other evidence located decedent, whose vision was impaired, where the fireman, at least, if he looked as he testified, must have seen him feeling his way across the track with his cane in time to have avoided the collision. Added to this the jury might have found that in backing no signal was sounded. Whether the fireman so saw decedent, notwithstanding his denial, was an issue for the jury.

Purcell vs. Ry. 117 Iowa, 667;
Farrell vs. Ry. 123 Iowa, 690;
Gregory vs. Ry. 126 Iowa, 230;

And if he saw him the jury might well have concluded that he should have appreciated the peril of his situation in time to have avoided a collision.

Discovering no error in the record, the judgment is

Affirmed.

121–130 SUPREME COURT OF IOWA,
State of Iowa, ss:

Be it remembered, That on the 22nd day of October, 1912, following proceedings, among others, were had in the Supreme Court of Iowa, to-wit:

No. 28514.

L. M. BACON, Administrator,
vs.
IOWA CENTRAL RAILWAY CO., Appellant.

Appeal from Mahaska County District Court.

In this cause, the Court being fully advised in the premises, file their written opinion Affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby Affirmed, and that a writ of procedendo issue accordingly.

It is further considered by the Court that the Appellant pay the costs of this appeal, taxed at $94.75, and that execution issue therefor.

Signed at the end of the day's proceedings by

EMLIN McCLAIN,
Chief Justice.

* * * * * * *

131 In the Supreme Court of Iowa.

L. M. BACON, Administrator, Appellee,
vs.
IOWA CENTRAL RAILWAY COMPANY, Appellant.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of Iowa:

Comes now the appellant in the above entitled cause and respectfully shows:

That on the 22nd day of October, 1912, the above entitled court handed down its decision in the above entitled case, affirming the judgment rendered against the appellant in the district court of Iowa, in and for Mahaska County, from which court the appeal to this court was prosecuted, that thereafter this appellant filed in due form and within the time required by law and the rules of this court, its petition for a rehearing in said cause; that on the 17th day of January A. D. 1913 this court entered its order over-ruling and denying said petition for a rehearing; that in its said decision the Supreme Court of Iowa held that the district court of Iowa in and for Mahaska County had jurisdiction to hear and determine said cause and denied the jurisdiction of the Circuit Court of the United States in and for the southern district of Iowa, to hear and determine said case, denied that the said Circuit Court of the United States had determined that it had jurisdiction and refused to give force and effect to the judgment and order of said Circuit Court of the United States in said cause.

That the above entitled court is the highest court of the state of Iowa in which a decision could be had in this case; that the judgment so rendered by the Supreme Court of Iowa was unwarranted by law as the appellant is advised.

Appellant presents herewith an assignment of errors and a bond in proper form and prays for an order allowing said appellant to prosecute a writ of error in said case to the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and that an order be entered staying all further proceedings in this court in this cause un-

132 til the determination of said writ of error.

W. H. BREMNER,
F. M. MINER,
JNO. O. MALCOLM,
Attorneys for Appellant.

Writ of error allowed and stay granted this 24th day of February A. D. 1913.

SCOTT M. LADD,
Acting Chief Justice, Supreme Court of Iowa.

133 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Iowa, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Iowa, before you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Iowa Central Railway Company, appellant and plaintiff in error, and L. M. Bacon, administrator, appellee and defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under said statute, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity, or wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the construction of a clause of the constitution or of a treaty, or statute of or commission held under the United States and the decision was against the right, title, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said Iowa Central Railway Company, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in its behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within thirty days from the date hereof in the said Supreme Court; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and constitution of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, the 24th day of February A. D. 1913.

[Seal U. S. District Court, Southern District of Iowa.]

WM. C. McARTHUR,
Clerk of the District Court of the United States for the Southern District of Iowa.

134 Allowed by—

SCOTT M. LADD,
Acting Chief Justice, Supreme Court of Iowa.

Service of the within writ of error and receipt of a copy thereof admitted this 25th day of February A. D. 1913.

L. T. SHANGLE,
J. U. McCOY, &
D. C. WAGGONER,
Solicitors for L. M. Bacon, Administrator, Defendant in Error.

135 In the Supreme Court of the United States.

IOWA CENTRAL RAILWAY COMPANY, Plaintiff in Error,
vs.
L. M. BACON, Administrator, Defendant in Error.

Assignment of Errors.

Comes now the plaintiff in error in the above entitled cause and avers and shows that in the record and proceedings in said cause, the Supreme Court of the State of Iowa erred to the grievous injury and wrong of the plaintiff herein and to the prejudice and against the rights of the plaintiff in error, in the following particulars, to-wit:

I.

That the said Supreme Court erred in rendering judgment affirming the judgment rendered in the District Court of Iowa, in and for Mahaska County, against the plaintiff in error.

II.

That the said Supreme Court erred in refusing to dismiss said cause on the ground that the said cause was on the 2nd day of October 1905 removed to the Circuit Court of the United States for the southern district of Iowa, and docketed therein, and was on the 11th day of May 1909 dismissed by said Federal Circuit Court for want of prosecution and judgment granted the plaintiff in error for costs.

III.

That the said Supreme Court erred in holding that the state courts had jurisdiction to hear and determine said cause, the same having been removed to the Circuit Court of the United States and the said Circuit Court having entered a judgment therein.

IV.

That the said Supreme Court erred in holding and determining that the state court had jurisdiction of said cause and had jurisdiction to hear and determine the same.

V.

That the said Supreme Court erred in holding and determining that the Circuit Court of the United States in and for the southern

district of Iowa had not decided that it had jurisdiction of said cause.

136 VI.

That the said Supreme Court erred in refusing to give force and effect to the finding of the Circuit Court of the United States to the effect that it had jurisdiction in said cause.

VII.

That the said Supreme Court erred in refusing to give full force and effect to the judgment of the said Circuit Court of the United States in said cause.

VIII.

That the said Supreme Court erred in holding that the state court had jurisdiction of the parties and the subject matter, the same having been removed to the Circuit Court of the United States, the said Circuit Court having assumed jurisdiction thereof, and having never remanded the same to the state court.

Wherefore, for these and other manifest errors appearing in the record, the said Iowa Central Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of Iowa be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error, and plaintiff in error also prays judgment for its costs.

W. H. BREMNER,
F. M. MINER,
JNO. O. MALCOLM,
Attorneys for Plaintiff in Error.

137 In the Supreme Court of the United States.

IOWA CENTRAL RAILWAY COMPANY, Plaintiff in Error,
vs.
L. M. BACON, Administrator, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents; That, we, Iowa Central Railway Company, a corporation organized under the laws of Illinois, as principal, and The United States Fidelity & Guaranty Company, a corporation organized under the laws of the state of Maryland, as surety, are held and firmly bound unto L. M. Bacon, Administrator, in the full and just sum of Fifteen Hundred Dollars ($1500) to be paid to the said L. M. Bacon, Administrator, his successors or assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the 23" day of January A. D. 1913.

Whereas, lately at a session of the Supreme Court of the State of Iowa, in a suit pending in said court between L. M. Bacon, Administrator, Appellee, and Iowa Central Railway Company, Appellant, a final judgment was rendered against the said appellant, and the said Iowa Central Railway Company, Appellant, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit and a citation directed to the said L. M. Bacon, Administrator, is about to be issued, citing and admonishing him to be and appear at the Supreme Court of the United States at Washington within thirty (30) days from the date thereof;

Now, the condition of the above obligation is such that if the said Iowa Central Railway Company shall prosecute its writ of error to effect and answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

IOWA CENTRAL RAILWAY COMPANY,
By W. G. BIERD,
Vice President & General Manager.

[Seal United States Fidelity and Guaranty Company, Incorporated.]

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By WIRT WILSON AND GEORGE E. MURPHY,
Its Attorneys in Fact.

H. J. HENKEL,
MAX SUSSMAN.

Approved:
SCOTT M. LADD,
Acting Chief Justice Supreme Court of Iowa.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 24th day of January 1913, before me, a Notary Public within and for said County and State, personally appeared Wirt Wilson and George E. Murphy, to me personally known, who being by me duly sworn upon oath did say that they are the Agents and Attorneys-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said Wirt Wilson and George E. Murphy did acknowledge that they executed the said instrument as the free act and deed of said Company.

BLANCHE W. SCALLEN,
Notary Public, Hennepin County, Minnesota.

My commission expires Feb. 1st, 1916.

138 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to L. M. Bacon, Administrator, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to the writ of error filed in the clerk's office of the Supreme Court of the State of Iowa, wherein Iowa Central Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Scott M. Ladd, Acting Chief Justice of the Supreme Court of the State of Iowa, this 24th day of February, A. D. 1913.

SCOTT M. LADD,
Acting Chief Justice, Supreme Court, State of Iowa.

Service of the within citation and receipt of a copy thereof admitted this 25th day of February A. D. 1913.

L. T. SHANGLE,
J. U. McCOY,
D. C. WAGGONER,
Solicitor for L. M. Bacon, Administrator, Defendant in Error.

139 STATE OF IOWA, *ss:*

I, B. W. Garrett, Clerk of the Supreme Court of the State of Iowa, do hereby certify that the foregoing pages contain a true and correct transcript of the Abstract, Amended Abstracts, Opinion, final judgment, Petition for Rehearing and ruling on same, in the case of L. M. Bacon, administrator appellee, defendant in error, against Iowa Central Railway Company, appellant, plaintiff in error, as full and complete as the same now appear and remain on file and of record in this office.

I further certify, that the Petition for writ of error, writ of error, assignment of error, Bond on writ of error, with approval endorsed on same, Citation, with acceptance of service of same, are hereto attached in there original form, and true and correct copies of each of them have been retained in this office and this return is made in obedience to said writ of error.

In testimony whereof my name and seal of said Court hereto attached at Des Moines, Iowa, this 11th day of March 1913.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,
Clerk Supreme Court of Iowa.

140 In the Supreme Court of the United States, October Term, 1912.

#1021.

IOWA CENTRAL RAILWAY COMPANY, Plaintiff in Error,
vs.
L. M. BACON, Administrator, Defendant in Error.

To the Clerk of said Court:

Attached hereto is a statement of the errors on which the plaintiff in error will rely on the hearing in the above cause, and the parts of the record which it thinks necessary for the proper consideration of such errors, and which it desires printed, as follows:

1. Abstract of Record except the following portions thereof: Plaintiff's evidence consisting of testimony of W. L. Bough, Zach Barnes, Norris Nelson, John McDonnough, Lewis McMahon, Lewis McMahon, re-called, L. M. Bacon, Wm. Lockhart: Defendant's evidence consisting of the testimony of P. A. Quackenbush, H. B. Howarth, Mike Doud and P. McDonnough.
2. The Assignment of Errors by Appellant; filed as a part of its brief and argument in the Supreme Court of Iowa, under the rules of that court.
3. The Order submitting said cause in the Supreme Court of Iowa.
4. The Opinion of the Supreme Court of Iowa.
5. The Judgment in the Supreme Court of Iowa.
6. The Petition for Writ of Error.
7. Bond on Writ of Error.
8. Writ of Error.
9. Citation and service.
10. Assignment of Errors.
11. Clerk's certificate and return to Writ of Error.
12. Præcipe for printing with service.

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W. H. BREMNER,
F. M. MINER,
JOHN O. MALCOLM,
Attorneys for Plaintiff in Error.

Service of the above and the receipt of copy thereof, including copy of assignments of error, is hereby acknowledged at Oskaloosa, Iowa, this 12th day of June A. D. 1913.

L. T. SHANGLE,
D. C. WAGGONER,
J. N. McCOY,
J. B. BOLTON,
Attorneys for Defendant in Error.

142 In the Supreme Court of the United States.

IOWA CENTRAL RAILWAY COMPANY, Plaintiff in Error,
vs.
L. M. BACON, Administrator, Defendant in Error.

Assignment of Errors.

Comes now the plaintiff in error in the above entitled cause and avers and shows that in the record and proceedings in said cause, the Supreme Court of the State of Iowa erred to the grievous injury and wrong of the plaintiff herein and to the prejudice and against the rights of the plaintiff in error, in the following particulars, to-wit:

I.

That the said Supreme Court erred in rendering judgment affirming the judgment rendered in the District Court of Iowa, in and for Mahaska County, against the plaintiff in error.

II.

That the said Supreme Court erred in refusing to dismiss said cause on the ground that the said cause was on the 2nd day of October 1905 removed to the Circuit Court of the United States for the southern district of Iowa, and docketed therein, and was on the 11th day of May 1909 dismissed by said Federal Circuit Court for want of prosecution and judgment granted the plaintiff in error for costs.

III.

That the said Supreme Court erred in holding that the state courts had jurisdiction to hear and determine said cause, the same having been removed to the Circuit Court of the United States and the said Circuit Court having entered a judgment therein.

IV.

That the said Supreme Court erred in holding and determining that the state court had jurisdiction of said cause and had jurisdiction to hear and determine the same.

V.

That the said Supreme Court erred in holding and determining that the Circuit Court of the United States in and for the southern district of Iowa had not decided that it had jurisdiction of said cause.

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VI.

That the said Supreme Court erred in refusing to give force and effect to the finding of the Circuit Court of the United States to the effect that it had jurisdiction in said cause.

VII.

That the said Supreme Court erred in refusing to give full force and effect to the judgment of the said Circuit Court of the United States in said cause.

VIII.

That the said Supreme Court erred in holding that the state court had jurisdiction of the parties and the subject matter, the same having been removed to the Circuit Court of the United States, the said Circuit Court having assumed jurisdiction thereof, and having never remanded the same to the state court.

Wherefore, for these and other manifest errors appearing in the record, the said Iowa Central Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of Iowa be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error, and plaintiff in error also prays judgment for its costs.

W. H. BREMNER,
F. M. MINER,
JOHN O. MALCOLM,
Attorneys for Plaintiff in Error.

[Endorsed:] 1021/23,596.

144 [Endorsed:] File No. 23,596. Supreme Court U. S., October Term, 1912. Term No. 1021. Iowa Central Railway Company, Pl'ff in Error, vs. L. M. Bacon, Adm'x etc. Assignment of errors and designation by plaintiff in error of parts of record to be printed, with proof of service of same. Filed June 16, 1913.

Endorsed on cover: File No. 23,596. Iowa Supreme Court. Term No. 130. Iowa Central Railway Company, plaintiff in error, vs. L. M. Bacon, administrator of the estate of Martin W. Lockhart, deceased. Filed March 22d, 1913. File No. 23,596.

(23,596)

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 130.

IOWA CENTRAL RAILWAY COMPANY,
Plaintiff in Error,

vs.

L. M. BACON, ADMINISTRATOR OF THE ESTATE OF MARTIN W. LOCKHART, DECEASED,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Brief and Argument of Plaintiff in Error.

W. H. BREMNER,
F. M. MINER,
Attorneys for Plaintiff in Error.

Review Publishing Company, Minneapolis

INDEX.

TABLE OF CASES CITED.

(23,596)

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 130.

IOWA CENTRAL RAILWAY COMPANY,
Plaintiff in Error,

vs.

L. M. BACON, ADMINISTRATOR OF THE ESTATE OF MARTIN W. LOCKHART, DECEASED,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

STATEMENT OF THE CASE.

This cause comes to this court upon writ of error directed to the Supreme Court of the State of Iowa, to review a judgment of that court, upon the ground that the State Court was without jurisdiction, the United States Circuit Court for the Southern District of Iowa, having assumed jurisdiction thereof on removal, and upon the further ground that the State Court refused to give effect to a judgment of a United States Court. The plaintiff in error in this court was the defendant below, and

the defendant in error in this court was plaintiff below. The facts in so far as they are material are as follows:

On the 17th day of April, 1905, Martin W. Lockhart was killed in the city of Oskaloosa, Iowa, by being run over by an engine belonging to the Railway Company. The defendant in error was duly appointed administrator of the estate of the said Martin W. Lockhart, deceased, and on the 20th of September, 1905, commenced an action in the District Court of Iowa, in and for Mahaska county against the Railway Company to recover damages for the claimed wrongful killing of his intestate, by the service of an original notice (R., p. 1). (Under the law of Iowa actions are commenced by the service of what is called an original notice, in which notice the plaintiff must set forth the substance of his claim, the amount demanded and the date the petition in the cause will be filed in the office of the clerk of the District Court.)

In the original notice it was stated that the amount which would be claimed in the petition was ten thousand dollars. Pursuant to said notice the defendant in error filed in the office of the clerk of the District Court of Mahaska county on the 22nd day of September, 1905, his petition (R., p. 2). In the petition it was alleged that the estate had been damaged in the sum of ten thousand dollars, but judgment was demanded for one thousand nine hundred and ninety dollars.

On the 30th day of September, 1905, the plaintiff in error filed its answer in the said cause (R.,

p. 2), and on the 2nd day of October, 1905, and within the time required by law, the plaintiff in error filed its petition for removal of said cause to the United States Circuit Court in and for the Southern District of Iowa, on the ground of diversity of citizenship, alleging that the amount in controversy, exclusive of interest and costs, exceeded the sum of two thousand ($2,000.00) dollars (R., p. 3). Accompanying the petition for removal was a bond for costs (R., p. 4). The District Court of Mahaska county did not enter any order directing the removal of the cause but on the 29th day of March, 1906, the clerk of the said District Court of Mahaska county filed in the office of the clerk of the Circuit Court of the United States, in and for the Southern District of Iowa, a transcript of the proceedings in said cause (R., p. 5). This transcript was duly certified by the clerk of said District Court of Iowa and the signature of said clerk was duly attested by the judge of said District Court (R., p. 5). After the filing of the said transcript in the United States Court the cause was dropped from the docket of the Iowa District Court (R., p. 5). After the filing of the transcript in the United States Court the cause was continued from term to term by orders duly signed by the judge thereof and duly recorded (R., pp. 14-15), until on the 5th day of December, 1908, an order to notice said cause for trial at the next term, or show cause why it should not be dismissed, was entered, and the clerk was directed to mail and serve copy of said order on the attorneys for the parties (R.,

p. 16). On May 11th, 1909, there was entered in said Circuit Court of the United States an order of dismissal at plaintiff's (defendant in error) cost, for want of prosecution, and the defendant (plaintiff in error) was given judgment for its costs (R., pp. 16-17). On the 19th day of September, 1912, more than four years after the transcript had been filed in the United States Court, and more than a year after the case had been dismissed by said court, the defendant in error filed in the office of the clerk of the District Court of Iowa, in and for Mahaska county, a pleading which he entitled an Amended and Substituted Petition, and thereupon the clerk of said court placed the case again upon the docket (R., p. 5).

On the 6th day of October, 1910, the District Court of Mahaska county entered an order denying the application of the defendant (plaintiff in error) for removal of the cause to the United States Circuit Court, on the ground that the amount in controversy exclusive of interest and costs was less than two thousand dollars (R., p. 7). The application for removal referred to in the order is the one which was filed on October 2nd, 1905.

After the entry of said order various pleadings were filed by both parties (R., pp. 7-11), and on the 28th day of February, 1911, the plaintiff in error filed a motion to dismiss the cause and to strike from the files the pleadings filed by the defendant in error subsequent to the 1st day of September, 1905, the pleadings referred to being those filed in 1910 and 1911 (R., p. 11). This motion was based

on the ground that the cause had been removed to the United States Circuit Court and docketed therein, and thereafter dismissed by said Federal Court for want of prosecution, and that said cause had never been remanded by said Federal Court to the State Court. Attached to said motion and made a part thereof was a certified copy of the record made in the United States Court (R., p. 12). This record is set out on pages 12 to 17 of the transcript of the record in this case.

A hearing was had on this motion and on the 4th day of March, 1911, the Iowa District Court entered an order denying the motion (R., p. 19). On the 6th day of March the case came on for trial in the District Court, and such proceedings were had that the jury returned a verdict in favor of the plaintiff in the sum of eight hundred and fifty dollars (R., p. 26). The defendant (plaintiff in error), on the 13th day of March, 1911, filed its motion for a new trial upon various grounds, including the grounds set forth in the motion to strike heretofore referred to, which motion was denied (R., p. 28), and on the 10th day of March, 1911, a judgment was duly entered of record in favor of the plaintiff against the defendant in the sum of eight hundred and fifty ($850.00) dollars and costs. From this judgment the defendant (plaintiff in error) perfected its appeal to the Supreme Court of the State of Iowa (R., p. 29), with the result that the judgment of the lower court was duly affirmed, thus rendering the judgment final (R., p. 35). The Supreme Court of Iowa in substance held that the

amount in controversy did not exceed two thousand dollars, that there was no adjudication of the right of removal by the United States Circuit Court, and that the State Court had never lost jurisdiction and there was no error in proceeding to determine the issues.

The questions to be determined by this court are:

Did the State Court lose jurisdiction by reason of the removal to the United States Circuit Court?

Were the proceedings had in the United States Court such as to constitute a determination by that court that it had jurisdiction?

Is the effect of the action taken by the State Courts a refusal to give proper recognition to a judgment of the Circuit Court of the United States?

ASSIGNMENT OF ERRORS.

The plaintiff in error asserts that the Supreme Court of the state of Iowa erred in the following particulars, to-wit:

1.

That the said Supreme Court erred in rendering judgment affirming the judgment rendered in the District Court of Iowa, in and for Mahaska county, against the plaintiff in error.

2.

That the said Supreme Court erred in refusing to dismiss said cause on the ground that the said

cause was on the 2nd day of October, 1905, removed to the Circuit Court of the United States for the southern district of Iowa, and docketed therein, and was on the 11th day of May, 1909, dismissed by said Federal Circuit Court for want of prosecution and judgment granted the plaintiff in error for costs.

3.

That the said Supreme Court erred in holding that the State Courts had jurisdiction to hear and determine said cause, the same having been removed to the Circuit Court of the United States and the said Circuit Court having entered a judgment therein.

4.

That the said Supreme Court erred in holding and determining that the State Court had jurisdiction of said cause and had jurisdiction to hear and determine the same.

5.

That the said Supreme Court erred in holding and determining that the Circuit Court of the United States in and for the Southern District of Iowa had not decided that it had jurisdiction of said cause.

6.

That the said Supreme Court erred in refusing to give force and effect to the finding of the Circuit Court of the United States to the effect that it had jurisdiction in said cause.

7.

That the said Supreme Court erred in refusing to give full force and effect to the judgment of the said Circuit Court of the United States in said cause.

8.

That the said Supreme Court erred in holding that the State Court had jurisdiction of the parties and the subject matter, the same having been removed to the Circuit Court of the United States, the said Circuit Court having assumed jurisdiction thereof, and having never remanded the same to the State Court.

BRIEF.

I.

The Amount in Controversy.

The decision of the Supreme Court of Iowa to the effect that the amount in controversy is to be determined by the prayer for judgment contained in the petition, being a decision upon a question of state practice based upon the interpretation of the statutes of the state is probably final as to the amount in controversy, so long as the case remained in the courts of Iowa, and, therefore, is probably not reviewable in this court. After the removal to the United States Court the amount in controversy would be for determination by the Federal Court under the rules of practice prevailing in that court.

However that may be, prior to the decision in this case this question was an open one in the State of Iowa, and there was ample authority for holding that in determining the amount in controversy the prayer of the petition should be disregarded. In support of this we submit the following:

1. In Iowa actions are commenced by the service of what is called an original notice, which must state, among other things, if the action is brought to recover money, the amount thereof. The commencement of actions is governed by Section 3514 of the Code of 1897, which reads as follows:

> "ORIGINAL NOTICE. Action in a court of record shall be commenced by serving the defendant with a notice, signed by the plaintiff or his attorney, informing him of the name of the plaintiff, that a petition is, or on or before the date named therein will be, filed in the office of the clerk of the court wherein action is brought, naming it, and stating in general terms the cause or causes thereof, and if it is for money, the amount thereof, and that unless he appears thereto and defends before noon of the second day of the term at which defendant is required to appear, naming it, his default will be entered and judgment or decree rendered against him thereon. In all cases where the time for the commencement of the term has been changed after the notice has been served, the defendant shall be held to appear at the time to which such term has been changed."

2. Under the Code of Iowa the petition of the plaintiff must contain, among other things, a demand for the relief to which the plaintiff considers himself entitled. This section in so far as it is ma-

terial to this case reads as follows:

> "The petition must contain: * * * 4. a demand of the relief to which the plaintiff considers himself entitled and if for money the amount thereof."

3. Section 3775 of the Code of 1897 of Iowa provides:

> "WHAT RELIEF GRANTED. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he has demanded in his petition. In any other case the court may grant him any relief consistent with the case made by the petition and embraced within the issue."

4. The original notice fixed the amount which would be claimed by the plaintiff at ten thousand dollars (R., p. 1). The petition alleged that because of the claimed wrongful killing of the plaintiff's intestate, the plaintiff had been damaged in the sum of ten thousand ($10,000.00) dollars (R., p. 2).

5. Under statutes similar to the statutes of Iowa above referred to, it has been held that after an answer has been filed the prayer for relief becomes immaterial and that the court may give judgment for such an amount as is consistent with the issues made and the proof.

Marquat v. Marquat, 2 Kern. (12 N. Y. 336).

1 Bates' Pleading 315.

Erck v. Omaha National Bank, (Nebr.) 62 N. W. 67.

6. The prayer for relief forms no part of the petition and the sufficiency and character thereof,

as well as the amount involved must be determined from the facts stated and not from the prayer for relief.

Henry v. McKittrick, 42 Kas. 485.

Tiffin Glass Co. v. Stoehr, 54 Ohio State 157.

7. The Supreme Court of Iowa had prior to the decision in this case, in various opinions held that the plaintiff was not limited to the relief asked by his petition.

In the case of *Wilson v. Miller & Beeson*, 16 Iowa 111, the court said:

> "Where an answer is filed the plaintiff is not limited to the relief asked by his petition, but may have any relief consistent with the case made by the petition and embraced within the issues (Revised Section 3133)."

Section 3133 referred to in the opinion is Section 3133 of the Revision of the Code of Iowa of 1860, and is identical with Section 3775 of the Code of 1897 above quoted.

In the case of *Marder Luse & Co. v. Wright*, 70 Iowa 42, 45, the Supreme Court of Iowa approves the opinion in the case of *Wilson v. Miller, supra*, saying:

> "When an answer is filed he (the court) may award any relief consistent with the case, made by the petition or embraced within the issues made by the answer."

In the case of *Johnson v. Rider*, 84 Iowa 50, the lower court had given judgment for an amount greater than that demanded in the petition, and in reference thereto the court said on page 54:

"The relief granted was consistent with the case made by the petition, was embraced within the issues presented by the pleadings, and was shown by the evidence to be due to the plaintiff. We do not think the judgment should be disturbed on the ground that it is excessive."

II.

THE STATE COURT WAS WITHOUT JURISDICTION, THE CASE HAVING BEEN ACTUALLY REMOVED TO THE UNITED STATES CIRCUIT COURT AND THAT COURT HAVING DETERMINED IT HAD JURISDICTION THEREOF.

1. A petition for removal in proper form accompanied by bond for costs as required by law, was duly filed in the State District Court within the time required by law (R., pp. 3, 4). Thereafter the clerk of the District Court of Iowa prepared and filed in the office of the clerk of the Circuit Court of the United States in and for the Southern District of Iowa a transcript of the proceedings in the State Court. This transcript was duly certified by said clerk of the State Court and the signature of such clerk was duly attested by the judge of the State Court (R., pp. 5, 13). After the filing of the transcript of the Federal Court the case was dropped from the docket in the State Court until September 19th, 1910, more than four years after the filing of the transcript in the United States Court (R., pp. 5-19).

2. After the filing of the transcript in the United States Court the case was continued from term

to term by orders of the court duly entered of record, the first being entered on December 5th, 1906. On December 5th, 1908, an order was entered to the effect that unless the case was noticed for trial at the next term, or good reason shown for not doing so, the same would be dismissed for want of prosecution. On May 11th, 1909, an order was entered in the following terms, to-wit:

> 'This cause came on this day for hearing, the defendant appearing by John I. Dille, and plaintiff not appearing, the same was dismissed at plaintiff's cost for want of prosecution. Thereupon it was ordered that the defendant go hence without day and recover its costs, taxed at .....dollars, and that execution issue therefor" (R., pp. 14-16).

3. The fact that no order directing the removal of the case was entered by the State Court is immaterial, as such an order or the failure to make such an order does not affect the question of removal.

Brigham v. C. C. Thompson Lbr. Co., 55 Federal 881-884.

State v. Coosaw Mining Co., 45 Federal 804-809.

LaPage v. Day, 74 Federal 977.

Kern v. Huidekoper, 103 U. S. 485.

Eisemann v. Delmar's Nevada Gold Mining Co., 87 Federal 248.

Loop v. Winter's Estate, 115 Federal 362.

Van Horne v. Litchfield, 70 Iowa 11.

Byson v. McPherson, 71 Iowa 437.

Ohle v. C. & N. W. Ry. Co., 64 Iowa 599.

Chambers v. Illinois Cent. Ry. Co., 104 Iowa

238.

Myers v. C. & N. W. Ry., 118 Iowa 312, 325.

Turner v. Farmers' Loan & Trust Co., 106 U. S. 552.

Marshall v. Holmes, 141 U. S. 589-595.

4. The case was actually removed, whether rightfully or not, and the State Court lost jurisdiction by such removal and could only recover jurisdiction by remand from the Federal Court or the commencement of a new action.

State v. Coosaw Mining Co., 45 Federal 804, 809.

C. & O. Ry. Co. v. McCabe, 213 U. S. 207.

5. If the Federal Court was without jurisdiction because the case was not removable, the remedy of the plaintiff was by moving to remand in the Federal Court.

Turner v. Farmers' Loan & Trust Co., 106 U. S. 552, 555.

C. & O. Ry. Co. v. McCabe, 213 U. S. 207, 218.

Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552, 559.

Judge v. Arlen, 71 Iowa 186.

6. A petition for removal sufficient in all respects and in proper form, and a good and sufficient bond being filed, the case was removed, and thereafter only the Federal Court could determine whether or not it had jurisdiction.

Van Horne v. Litchfield, 70 Iowa 11.

Byson v. McPherson, 71 Iowa 437.

Turner v. Farmers' Loan & Trust Co., 106 U. S. 552.

C. & O. Ry. Co. v. McCabe, 213 U. S. 207.

Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552-559.

Ohle v. C. & N. W. Ry. Co., 64 Iowa 599.

Myers v. C. & N. W. Ry. Co., 118 Iowa 312-325.

Carson v. Hyatt, 118 U. S. 279-287.

Burlington Ry. Co. v. Dunn, 122 U. S. 513.

State v. Coosaw Mining Co., 45 Federal, 804-809.

Eisemann v. Delemar's Gold M. Co., 87 Fed. 248.

Starr v. C. R. I. & P., 110 Federal 3-6.

7. Even though no question as to the jurisdiction of the Federal Court was raised in that court by any party to the litigation it must be presumed that the court determined for itself that it had jurisdiction before proceeding with the case, and even though jurisdiction was improperly assumed, nevertheless the judgment of the United States Court is binding until reversed.

Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552.

8. Even if it be true that orders continuing the case from time to time are only to be considered as a postponement of action and not as indicating that the court had assumed jurisdiction, this would not be true as to an order of dismissal and a judgment for costs. The Federal Court must have found that it had jurisdiction in order to give to either

party a judgment against the other for any amount whatsoever. If it had determined that it did not have jurisdiction its duty would have been to remand the case to the State Court, even though no motion asking for a remand was made, and in the event of such remanding it should have given judgment for costs against the party causing the removal.

9. The judgment for costs entered by the United States Court in favor of the plaintiff in error (R., pp. 16, 17), is still in full force and effect, never having been set aside or reversed and cannot be treated as a nullity.

10. The effect of the decision by the Supreme Court of Iowa is to hold that the judgment of the United States Court is a nullity and the action of the State Courts amounts to a refusal to give effect to a valid existing judgment of a United States Court.

ARGUMENT.

The Amount in Controversy.

The first question for determination by the Supreme Court of Iowa was whether the amount in controversy in this case exceeded $2,000.00. Upon this question the Supreme Court of Iowa held that the amount in controversy was to be determined by the amount for which judgment was prayed, notwithstanding the allegation in the petition that the plaintiff had been damaged more than that sum

(R., p. 32). The opinion was based upon an interpretation of the statutes of Iowa and as a matter of statutory construction would be undoubtedly binding upon the United States courts. At any rate it is certain that it is determinative of the fact that had the case remained in the State Court the plaintiff below could not have recovered more than the amount for which judgment was prayed, to-wit: $1,990.00. In its opinion the court says that "it may be conceded that there are authorities which seem to hold that under like statutes the prayer for relief becomes wholly immaterial after an answer has been filed" (R., p. 31).

The Supreme Court of Iowa itself had in previous cases used language which justified a belief that in a like action the plaintiff was not bound by the relief demanded in the petition. In the case of *Johnson v. Rider*, 84 Iowa 50, cited in the brief it is said on page 54:

> "Some question is made as to the amount of the judgment, and it is said it is greater than that demanded in the petition. The relief granted was consistent with the case made by the petition, was embraced within the issues presented by the pleadings and was shown by the evidence to be due the plaintiff. We do not think the judgment should be disturbed on the ground that it is excessive."

This opinion was handed down in October, 1891. It would appear, therefore, that the plaintiff in error had ample grounds for believing that the amount in controversy was to be determined not by the prayer for relief but by the body of the petition, and that the Federal Court had ample ground for

holding that the amount in controversy was not to be determined by the prayer for judgment.

It is a general rule that all questions relating to the right of removal are questions for the Federal Courts and not for the State Courts, but it is probable that in determining a question pertaining to the right of removal, which depends more or less upon the construction to be given to state statutes, the Federal Courts should follow the interpretation given to such statutes by the highest court of the state.

It may, therefore, be conceded that in view of the opinion of the Supreme Court of Iowa, as this case stood when commenced in the District Court of Mahaska county, the amount involved was less than $2,000.00. The case having once been removed, however, to the Federal Court, the question of the amount which plaintiff might recover in that court is no longer one of statutory construction but one of general law, which the Federal Court could determine for itself.

That there was ample support for a holding by the Federal Court that the amount involved exceeded $2,000.00, is indicated in our brief, *supra*.

Whether or not the Iowa court was correct in holding that the amount in controversy did not exceed $2,000.00, or whether or not the Federal Court was wrong in assuming jurisdiction is, in our view of the case, wholly immaterial, for the reason that the Federal Court having determined that there was more than $2,000.00 involved, and having assumed jurisdiction and having rendered judg-

ment, and that judgment remaining unreversed, and its decision upon the question of jurisdiction remaining unreversed, the question is foreclosed.

II.

The Jurisdiction of the State Court.

The record discloses that the plaintiff (defendant in error) commenced his action on the 20th day of September, 1905, by the service of an original notice, in which he stated that he would demand damages in the sum of $10,000.00 (R., p. 1). In his petition which was filed on September 22nd, 1905, he alleged that he had been damaged in the sum of $10,000.00 (R., p. 2). On the 2nd of October, 1905, and within the time required by law, the defendant filed its petition for removal upon the ground of diversity of citizenship, accompanied by bond for costs (R., pp. 3, 4). The petition alleged the amount in controversy to be more than $2,000.00, exclusive of interest and costs, and it was properly verified. Thereafter the clerk of the State District Court prepared a transcript of the record duly certified to by him, his signature being attested by the then judge of the District Court (R., pp. 5, 13). This transcript was on the 29th day of March, 1906, duly filed in the office of the clerk of the United States Circuit Court for the Southern District of Iowa (R., pp. 5, 13). After the filing of said transcript of the Circuit Court of the United States, no further proceedings were had in the State Court, and the case was dropped from the docket until

September, 1910, when an amended and substituted petition was filed by the defendant in error (R., p. 5). On the 6th day of October, 1910, the State District Court entered an order denying the application of plaintiff in error for removal of the cause to the United States Circuit Court (R., p. 7). This order relates to the application for removal filed in 1905, and we attach no importance to it, and cannot conceive how it can have any bearing upon this controversy, for the reason that it was entered long after the case was actually removed to the Federal Court and after the Federal Court had assumed jurisdiction and had dismissed the case. If we are right in our contention that the State Court lost jurisdiction by an actual removal of the case to the Federal Court and the assumption of jurisdiction by that court, then the order entered on the 6th day of October, 1910, is a nullity.

After the filing of the transcript of the record in the Federal Court, that court by various orders continued the case from time to time, and on December 5th, 1908, entered an order directing that unless the cause was noticed for trial at the next term or good reason shown for not so doing, it would be dismissed for want of prosecution, and on May 11th, 1909, the case coming on to be heard and the defendant appearing by its attorney, and the plaintiff (defendant in error), not appearing, the Federal Court dismissed the case at plaintiff's cost for want of prosecution, entered a judgment in favor of the defendant (plaintiff in error), for costs and directed that execution issue therefor (R., pp.

16, 17).

Upon this record it is the contention of the plaintiff that the State Court lost jurisdiction of the case and after the removal in 1905 was without power or authority to proceed further, and that it therefore erred in holding that it had jurisdiction, in overruling the defendant's motion to dismiss, in overruling defendant's motion in arrest of judgment on the ground of want of jurisdiction and in refusing to give effect to the judgment of the United States Circuit Court, and that the Supreme Court of Iowa erred in sustaining the lower court in so doing.

It is unimportant that no formal order of removal was entered in the State Court before the preparation of the transcript, and its filing with the clerk of the United States Court, as such an order is not necessary in order to effectuate a removal. The transcript was made, certified and attested voluntarily by the clerk and the judge of the State Court, and not in response to any writ from the Federal Court, and the dropping of the case from the docket of the State Court was also voluntary. The effect of the acts of the State Court was to constitute an actual removal or transfer of the case to the Federal Court. If a formal order had been entered by the State Court directing the removal we apprehend that we would not now be here, but that the State Court would never have attempted to again assert jurisdiction of the case, and yet the acts of the State Court in preparing and certifying to the transcript, and filing the same with the clerk

of the United States Court had the same effect as though a formal order had been entered directing the removal.

If the lower court had entered an order directing the removal of the case to the Federal Court such order could not have been reviewed on appeal to the Supreme Court of the State of Iowa. In the case of *Sundberg v. Babcock*, 61 Iowa 601, the Supreme Court of Iowa held that no appeal should or could be taken from an order transferring a case to the United States Court. If that court had no power to review an order of the District Court, transferring a case to the Federal Court how could the District Court itself, four years after it had in effect directed a removal, review its own act. The effect of an order of removal entered by the order of the State Court, or the effect of an actual removal, even though an order is not entered, is to take action which is final in so far as the State Court is concerned. After the actual removal had taken place the Federal Court was the only court which had power to pass upon the question of jurisdiction. Whether the District Court of the state acted erroneously or not in transferring the case to the United States Court, nevertheless by so doing it lost jurisdiction and could not by any procedure on its own part reinvest itself with jurisdiction of the same case. After the filing of the transcript in the Federal Court, whether erroneously or not, there was nothing left in the State Court. The case was no longer pending in that court. Whether the case was properly removable or not the State Court,

having voluntarily assented to the removal that court lost jurisdiction and the Federal Court having assumed jurisdiction and having entered judgment of dismissal and for costs, such judgment is not only valid but is to be treated as in full force and effect until reversed.

It is well settled that the Federal Court alone has power to determine the extent of its jurisdiction, and whether or not it has jurisdiction in any particular case, and such right is not in any degree or manner affected by anything which the State Court may do.

This is not a case in which the State Court elected to retain jurisdiction after the petition for removal had been filed, but it voluntarily surrendered its jurisdiction. If the State Court had not voluntarily granted a removal the plaintiff in error would have had the right to appear before the Circuit Court of the United States, and by proper proceedings obtained an order requiring the State Court to certify the record to it, and the Federal Court having decided that it had jurisdiction it might by injunction have prevented further proceedings in the State Court. These principles are so well settled that a reference to the authorities in support thereof would serve no useful purpose.

Will this court hold that the State Court, by voluntarily surrendering jurisdiction, may place itself in a better position than it would be if had been required to forward a transcript to the United States Court by an order of that court; that, after having voluntarily surrendered its jurisdic-

tion and the Federal Court having asserted jurisdiction, the State Court may again invest itself with jurisdiction without any action to that end on the part of the Federal Court?

It must be assumed that the United States Circuit Court was of the opinion that it had jurisdiction else it would not have taken the case and entered orders therein. It is true that the record does not disclose that the question of jurisdiction was ever raised by a motion to remand or otherwise in that court, but the presumption is that the court itself before entering any orders in the case, and before entering judgment did determine that it had jurisdiction.

Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552-559.

We understand the rule to be that when a case is presented to a Federal Court its first duty is to determine for itself whether or not it has jurisdiction, and if it determines that it has not, to proceed no farther, and that this is its duty whether or not any party litigant questions the jurisdiction.

The Supreme Court of Iowa in its opinion says that the Federal Court never ruled on the question of whether it acquired jurisdiction (R., p. 33). It further says:

> "It merely entered orders continuing the case and finally dismissed the same without ruling hereon, or on its merits. Continuance orders were not inconsistent with the want of jurisdiction for this simply postponed action of any kind touching the disposition of the case. Nor was the dismissal a bar to the prosecution of another action."

Whatever may be the effect of the orders of continuance it certainly cannot be said that the entering of an order of dismissal and of a judgment for costs did not require a determination on the part of the United States Court of the question of jurisdiction. The order of dismissal ended the case. The order for a judgment was necessarily contingent upon proper jurisdiction. If the Federal Court had not determined that it had jurisdiction of the case then it would have been its duty to enter an order remanding the case to the State Court. No such order having been entered it must be presumed that the Federal Court determined that it did have jurisdiction. It may be true that this order of dismissal was not a bar to the prosecution of another action, but the difficulty is that we are not considering in this case another action. The Supreme Court of Iowa has permitted the defendant in error to maintain the same action. Another action could not have been maintained by the defendant in error for the reason that the statute of limitations had run prior to the entry of the order of dismissal in the United States Court. The Supreme Court of Iowa expressly held that the plea of the statute of limitations was not good for the reason that the filing of the amended petition in 1910 was but a continuance of the original action commenced in 1905 (R. p. 34).

The Supreme Court of Iowa in its opinion implies that if this case had proceeded to a judgment on its merits in the Federal Court it would have been bound to consider such a judgment as a

good plea in bar of the action in the State Court. The Federal Court when it entered its order directing that the case be noticed for trial at the next term or it would be dismissed, said to both parties: "This court is ready to try this case," and if both parties had appeared at the next term undoubtedly the case would have proceeded to a trial on its merits, and if at the conclusion of the plaintiff's testimony it had appeared that he had no cause of action the cause might have been dismissed and a judgment for costs granted to the defendant, and the final entry would have been identical with the final entry made, save only as to the cause of the dismissal. We can see no difference between a judgment for costs rendered after a full hearing on the merits, and a judgment for costs rendered against one of the parties because of his failure to appear, the other party having appeared.

The difficulty into which the Supreme Court of Iowa seems to have fallen is due to the fact that it assumed that since in its opinion the case was not properly removable, the acts of the State Court actually removing the case are to be treated as a nullity, and that it was still pending in the State Court, notwithstanding the fact that it had actually been removed to the Federal Court and that court had assumed jurisdiction. In other words, the opinion of the Supreme Court of Iowa is based upon the assumption that the case being not properly removable, no act on the part of the State Court or the Federal Court could accomplish a removal. In so holding it is at variance with the

opinions heretofore rendered by this court.

The Supreme Court of Iowa entirely overlooks the fact that the Federal Statutes provide a remedy in case a cause is improperly removed to the Federal Court, this remedy being the filing of a motion to remand in the United States Court. This was the only remedy which was open to the defendant in error after the case had been docketed in the United States Court.

In the case of *Chesapeake & Ohio Ry. v. McCabe*, 213 U. S. 207, the court, on page 218, quoting from the opinion of Mr. Chief Justice Waite in *Railroad Co. v. Koontz*, 104 U. S. 4, says:

> "The right to remove is derived from a law of the United States, and whether a case is made for removal is a Federal question. * * * When the suit is docketed in the Circuit Court, the adverse party may move to remand. If his motion is decided against him, he may save his point on the record and after final judgment bring the case here for review if the amount involved is sufficient for our jurisdiction. If in such case we think his motion should have been granted, we reverse the judgment in the Circuit Court and direct that the suit be sent back to the state court to be proceeded with there as if no removal had been had. If the motion to remand is decided by the Circuit Court against the petitioning party, he can at once bring the case here by a writ of error or appeal for a review of that decision without regard to the amount in controversy."

On page 219 *et seq.*, of the same opinion it is said:

> Conceding that, except for the principle of comity, the state court may decide the question of jurisdiction for itself in the absence of an injunction from the Federal Court in aid of

its own jurisdiction, or a writ of certiorari requiring the state court to surrender the record under the act of 1875, is the state court obliged to give effect to the judgment of the United States Circuit Court from which no writ of error is taken, and rendered in the Federal Court after it has sustained its own jurisdiction and refused to remand the action?

In view of the fact that the question is a Federal one, and that the state court is given no right to review or control the exercise of the jurisdiction of the Federal Court, we think that such Federal judgment cannot be ignored in the state court as one absolutely void for want of jurisdiction, and that such judgment until reversed by a proper proceeding in this court, is binding upon the parties, and must be given force when set up in the action. This view is sustained in the former decisions of this court upon the subject. In *Des Moines Navigation Company v. Iowa Homestead Company*, 123 U. S. 552, this court considered the effect of a judgment rendered in the Federal Court upon removal from the state court. In that case it appeared that the Federal court ought not in fact to have taken jurisdiction, for it appeared upon the face of the record that some of the defendants who did not join in the petition for removal were citizens of the same state as the plaintiff. The state court of Iowa refused to give effect to the judgment of the Federal Court, and its judgment was reversed.

Mr. Chief Justice Waite, speaking for the court said (123 U. S. 559):

"Whether in such a case the suit could be removed was a question for the Circuit Court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate on matters in dispute between two

citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal."

In *Dowell v. Applegate,* 152 U. S. 327, the benefit of a judgment in the Circuit Court of the United States was claimed. That judgment was the basis of a conveyance to the plaintiff in error, and it was contended that the conveyance was void, inasmuch as the Federal Court had no jurisdiction of the suit in which the sale was ordered. It was held in his court that even if the Federal Court erred in assuming or retaining jurisdiction of the suit, its decree being unmodified and unreversed, could not be treated as a nullity. After citing previous decisions of this court, the court, speaking through Mr. Justice Harlan, said (152 U. S. 340):

'These cases establish the doctrine that, although the presumption in every stage of a cause in a Circuit Court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, *Bors v. Preston*, 111 U. S. 252, 255, and the authorities there cited, yet, if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity.

'These authorities, above cited, it is said, do not meet the present case, because the ground on which, it is claimed the Federal Court as-

sumed jurisdicion was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error or appeal to this court.'

Applying these principles to the case at bar, we think the state court erred in refusing to give effect to the judgment set up in the answer offered in the state court. When the application for removal was made in the State Circuit Court, that court held the case removable, and the record was filed in the Federal Court. Afterwards that court, upon the application of the plaintiff refused to remand the suit, and proceeded to a final determination thereof, and rendered judgment accordingly.

It is not necessary to determine whether the case was removable or not. The Federal Court was given jurisdiction to determine that question, it did determine it, and its judgment was conclusive upon the parties before it, until reversed by a proper proceeding in this court. Instead of bringing the case here the plaintiff proceeded in the state court, and that court denied effect to the Federal judgment. The plaintiff in error lost no right when thus compelled to remain in the state court, notwithstanding the Federal judgment in his favor, and brought the suit here by writ of error to the final judgment of the state court, denying his right secured by the Federal judgment. It was open to the plaintiff to bring the adverse decision of the Federal Court on the question of jurisdiction to this court for review. This course was not pursued, but the action proceeded in the state court evidently

upon the theory that the judgment of the Federal Court was a nullity if it had erred in taking jurisdiction.'"

From this opinion it clearly appears that when the Federal Court has once taken jurisdiction on removal, whether or not the case was properly removed, its acts are not a nullity, but must be given full force and effect until reversed. The judgment in the Federal Court dismissing the action was binding upon the State Court, and since it was a dimissal of the very action which the court attempted to try, the court was without jurisdiction.

At the time the amended and substituted petition was filed in September, 1910, there was no case pending. The court had no right to receive and file a pleading in the case and such pleading should have been stricken. It makes no difference whether the case was removable or not. By taking jurisdiction and entering orders therein, the Federal Court has determined that it did have jurisdiction and that the case was removable. Such finding stands unreversed. It is apparent from the record also that the State District Court was of the opinion when the petition was filed in 1905 that the case was removable, for from the time the petition was filed, the State Court stopped all proceedings and the then district judge attached his signature to the transcript for the purpose of attesting the signature of the clerk. After the removal was had the defendant in error had a plain speedy way in which to have determined the question of whether or not the cause was removable. He could have

filed his motion to remand in the Federal Court and if the motion was denied he could have appealed to this court. He did not choose to follow this remedy, the course outlined by the United States statute.

He is not in a position to complain now even if the case was not removable. He has lost his day in court by failing to take the course which was open to him. It entailed no hardship upon him. No excuse is offered for failure to file his motion to remand in the Federal Court.

The proceeding on removal and the acts of the Federal Court are not a nullity, and cannot be ignored in the State Court in the manner in which they were ignored in this case. They are still in full force and effect, as is clearly pointed out in the opinion in the case of the *Chesapeake v. McCabe, supra,* and the opinions therein referred to.

In the case of *Dowell v. Applegate*, 152 U. S. 327, there is a very full discussion of the question of whether, if the Federal Court erred in assuming or retaining jurisdiction of a case, it follows that its final decree, unmodified and unreversed, can be treated as a nullity, and it was held that even if the court erred in entertaining jurisdiction, its determination was conclusive upon the parties before it and could not be questioned by them or either of them collaterally or otherwise than on writ of error or appeal to this court. In this opinion the court quotes with approval from the case of *Des Moines Navigation Co. v. Iowa Homestead Com-*

pany, 123 U. S. 552, as follows:

> "As said in *Des Moines Nav. Co. v. Iowa Homestead Co.*, above cited, if the Circuit Court 'kept the case when it ought to have been remanded or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal.'"

There seems to be no escape from the doctrine that the Federal Court having once assumed and exercised jurisdiction, its doing cannot be treated as a nullity even though it assumed jurisdiction wrongfully. That the remedy of the parties to the action is by appeal from the judgment of the lower Federal Court. It is immaterial that the question of jurisdiction of the Federal Court was not directly raised in that court for the reason that the court is presumed to have determined that it did have jurisdiction. In the case of *Des Moines Navigation Co. v. Iowa Homestead Company,* 123 U. S. 552, the question to be determined was whether the Supreme Court of Iowa had given force and effect to a prior adjudication of the issue by the Federal Court in the case of *Homestead Valley v. Railroad*

Co., 17 Wallace 153. It appeared that the latter case had been commenced in the State Court, had been removed to the Federal Court and the Federal Court had assumed jurisdiction and the question had proceeded to a final determination. No motion to remand was made and the question of jurisdiction was not specifically raised, but nevertheless the court held that, "Whether in such a case a suit could be removed was a question for the Circuit Court to decide when it was called on to take jurisdiction," and it was held that whether the suit was rightfully removed or not, the action of the Federal Court was not a nullity, and that the State Court must give full force and effect to its decree.

From these holdings of the Supreme Court of the United States it seems clear that the District Court of Mahaska county was without power or right to proceed with the trial of this case. It had no power to pass upon the question of jurisdiction after the actual removal to the Federal Court. Even though the removal was wrongful, the Federal Court alone had power to pass upon the question. It follows, therefore, that the question of the removability of this case has already been determined adversely to the plaintiff and the right of removal has been upheld by the Federal Circuit Court and that decision is still in force and effect and binding upon the defendant in error. He is not, therefore, in a position to question the right of the plaintiff in error to have the case removed. The action of the Federal Court in assuming jurisdiction and in entering judgment was a determination that the

case was removable and the question is no longer open.

Defendant in error confidently asserts that the Supreme Court of Iowa erred in holding that the State Court had jurisdiction to hear and determine this cause, in holding that the Circuit Court of the United States, in and for the Southern District of Iowa, had not passed upon the question of its jurisdiction, and in refusing to give force and effect to the finding of the said Circuit Court, and in refusing to give full force and effect to the judgment of that court; that the motion of plaintiff in error, asking for a dismissal of the cause, based upon the proceedings on removal, and the proceedings in the Circuit Court of the United States after removal, and the judgment rendered in said Circuit Court should have been sustained.

Respectfully submitted,

W. H. BREMNER,

F. M. MINER,

Attorneys for Plaintiff in Error.

(23,596)

Supreme Court of the United States.

OCTOBER TERM, 1914

No. 130.

IOWA CENTRAL RAILWAY COMPANY
Plaintiff in Error.

VS.

L. M. BACON, ADMINISTRATOR OF THE ESTATE OF MARTIN W. LOCKHART, DECEASED,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA

Brief and Argument of Defendant in Error

E. ELMER MITCHELL,
Solicitor Supreme Court U. S.
L. T. SHANGLE,
D. C. WAGGONER AND
J. N. McCOY, *of Counsel*

Due and legal service of within Brief and Argument is hereby acknowledged and accepted this.....day of December, 1914.

.....
Attorneys for Plaintiff in Error.

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STATEMENT OF THE CASE.

The Defendant in Error desires to controvert the statement of the Plaintiff in Error in certain particulars; The record does not show that the "Clerk of the District Court of Iowa filed in the office of the Clerk of the Circuit Court of the United States in and for the Southern District of Iowa a transcript of the record in said cause" as stated by plaintiff in error on page 3 of his argument. The only record relating to that fact is the evidence of L. E. Corlett, Clerk of the District Court of Iowa in and for Mahaska County, set forth on page 19 of the record of this cause in which he states as follows:

"I do not know whether the case of Bacon vs. The Iowa Central to which these entries refer was removed to the Federal Court in October, 1905. I remember certifying the case. IT WAS CERTIFIED ON THE 20TH DAY OF DECEMBER, 1905, AND FILED BY E. R. MASON, CLERK, ON MARCH 29TH, 1906. The fees for the Certificate and Transcript WERE PAID BY THE DEFENDANT COMPANY, DECEMBER 19TH, 1905. * * * I did not have any order for the removal in the transcript. So far as I have been able to find, I did not have any order of removal of record or in any other way. I do not think the court made any order of removal."

On Sept. 19th, 1910 defendant in error filed an amended and substituted petition as shown on page 5 of the Record, and on the 6th day of Oct. 1910, at the instance of the defendant in the original cause (Plff. in Error) the Mahaska County District Court entered the following order:

"Now on this day this cause coming on for hearing on motion and application of defendant for removal of cause to the United States Circuit Court and said motion and application having been heard by the court and the court being fully advised in the premises, finds that the amount in controversy is less than $2,000.00 exclusive of interest and costs and therefore said motion and application are overruled and defendant excepts. Defendant is given ten days to plead." (See record page 7).

The defendant then filed his answer making a general denial, pleading contributory negligence and the Statute of Limitations, and praying THAT THE CASE BE DISMISSED UPON ITS MERITS. (See Record page 7).

After all the above pleadings had been filed by both plaintiff and defendant in the original action, the defendant (plaintiff in error here) brought to the notice of the trial court the ex-parte proceedings in the Federal Court by filing a motion to dismiss the cause and to strike from the files all the pleadings of the plaintiff filed in said cause subsequent to the 1st day of September, 1905. Said motion being based on the alleged proceedings in The United States Circuit Court. (See record pages 11 to 17). This motion was over-ruled and the cause went to trial resulting in a verdict of $850.00 for Plaintiff, (Record page 26). On March 10th, 1911, judgment was duly entered for said sum. The Defendant (Plaintiff in Error) on March 13th, 1911 filed a motion for a new trial upon the grounds;

1st—That the verdict is contrary to law.

2nd.—That the verdict is not sustained by sufficient evidence and is against the greater weight thereof.

3rd.—That the verdict is not supported by any legal evidence.

4th and 5th.—That the damages assessed are excessive.

6th.—That the court erred in excluding evidence of contributory negligence.

7th.—That the court erred in withdrawing from the jury the issue of the Statute of limitations as a defense.

8th.—That the court erred in giving certain instructions.

9th.—That the court erred in giving Instruction No. 2 (Upon the doctrine of the last fair chance).

10th.—That the court erred in the admission and exclusion of certain evidence.

In the same motion the defendant moved the court in arrest of judgment upon the following grounds;

1st.—The court erred in holding that the cause was not barred by the statute of limitations.

2nd.—The court erred in holding that the cause of action as set out in the amended petition was not barred.

3rd.—That the court erred in holding that the petition and amended petition were in effect parts of the same pleading and that the cause therefore was not barred.

4th.—That the court erred in holding that it had jurisdiction of the action after the same had been removed to the Federal Court, (Record pp 26-28).

Said motion for new trial and in arrest of judgment was over-ruled and an appeal was taken to the Supreme Court of Iowa and in said court was affirmed.

(See opinion Iowa Supreme Court, Record page 29 et seq.).

The Plaintiff in Error states on page 6 of his Brief and Argument that the questions to be determined by this court are:

1st.—Did the state court lose jurisdiction by reason of the removal to the United States Circuit Court?

2nd.—Were the proceedings had in the United States Circuit Court such as to constitute a determination by that court that it had jurisdiction?

3rd.—Is the effect of the action taken by the State Court a refusal to give proper recognition to a judgment of the Circuit Court of the United States?

The defendant controverts the above propositions and avers that the questions brought to issue by the writ of error in this case are;

1st.—Was the cause removable under the United States Statutes?

2nd.—Did the United States Circuit Court ever obtain and assume jurisdiction of the case?

3rd.—Did the State Court ever lose jurisdiction and control of the case?

4th.—Can the Supreme Court of the United States review the decision of the Iowa Supreme Court which decision only seeks to construe the state law as to court procedure and practice.

BRIEF.

WAS THE CAUSE REMOVABLE? THE AMOUNT IN CONTROVERSY.

The amount in controversy is the sum for which judgment is prayed, notwithstanding the allegation of the petition that the plaintiff therein has been damaged more than that sum. The statute requires the petition to contain a demand of the relief to which the plaintiff considers himself entitled AND IF FOR MONEY THE AMOUNT THEREOF.

Code of Iowa 1897 Sec. 3559, par. 4.
Bottorff vs. Lewis 121 Iowa, 27 (33).
Brown vs. Kiel 117 Iowa, 316 (318).
Marder, Luse and Co. vs. Wright 70 Iowa, 42.
Tice vs. Derby 59 Iowa, 312.
Lefever vs. Stone 55 Iowa, 49, and all the other Iowa cases cited in the opinion of the Iowa Supreme

Court in this Cause. See (137 N. W. Rep. page 1011). (1013).

The Supreme Court further says in this case in the opinion

> "Following these decisions we necessarily reach the conclusion that the amount in controversy is less than $2,000.00 notwithstanding the allegation in the petition that the plaintiff had been damaged more than that sum"

Citing the following cases from other states;

Stark vs. Milling Co. 44 Wash. 309 (87 Pac. 339).

Smith vs. The Railway Co. 3 N. D. 17 (53 N. W. 173).

Lake Erie and W. Ry. Co. vs. Juday 19 Ind. App 436 (49 N. E. 843).

Lesh vs. Bailey 95 N. E. 341.

The amount in controversy must be determined from the pleadings and the case can not be removed from a state court to the United States Circuit Court unless it appears from the plaintiff's statement of his own case that the case is removable and if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

Minn. vs. Northern Securities Co. 194 U. S. 61 (48 L Ed 878).

Mex. Na. Ry. Co. vs. Davidson 157 U. S. 201, 208, (39 L. Ed. 672, 675).

Tenn. vs. Bank 152 U. S. 454 to 461 (38 L. Ed. 511 to 514.).

Chappell vs. Waterworth 155 U. S. 102 to 107 (39 L. Ed. 85 and 87).

If it does not appear at the outset that the suit is one of which the Federal Court at the time its jurisdiction is invoked, could properly take cognizance, the suit must be dismissed.

Third Street, Etc. Ry. Co. vs. Lewis 173 U. S. 457, 460 (43 L. Ed. 766, 767).

Minn. vs. Northern Securities Co. supra.

Consent of parties or the assumption thereof can not confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, the Supreme Court must, on its own motion so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute.

Minn. vs. Northern Securities Co. supra.

Defiance vs. Defiance 191 U. S. 184 (24 Supreme Court 63).

Central National Bank vs. Buford 191 U. S. 120 (24 Sup. Ct. 54).

JURISDICTION OF THE STATE COURT

It was the duty of the state court to determine whether the case was removable or not, for the reas-

on that if it were not removable, it was not onlythe right but the duty of the state court, to retain jurisdiction and to adjudicate the issues presented by the pleadings.

And the state court is not required to let go its jurisdiction until a case is made, which upon its face shows that the petitioner can remove the case to the Federal Court as a matter of right. (See opinion pp. 32, 33, 34) (137 N. W. 1011).

Burlington vs. Dunn 122 U. S. 513. (30 L. Ed. 1159).

Pa. Company vs. Bender 148 U. S. 255 (37 L. Ed. 441).

Meyer vs. Delaware R. S. Co. 100 U. S. 457 (25 L. Ed. 593).

Powers vs. Ches. and O. Ry. Co. 169 U. S. 92 (42 L. Ed. 673).

Gregory vs. Hartley 113 U. S. 745 (28 L. Ed. 1150).

In the Gregory case last cited it is said:

> "The District Court was not bound to surrender its jurisdiction until a case was made, which, on the face of the record, showed that the petitioners were, in law, entitled to a removal. The mere fiiing of the petition was not enough unless when taken with the rest of the record, it showed on its face that the petitioner had, under the statute, a right to take the case to another tribunal."

HAS PLAINTIFF IN ERROR WAIVED ITS RIGHT TO RAISE QUESTION OF REMOVAL?

The record shows that the defendant filed its answer on Sept. 30th, 1905. (rec. page 2): that defendant filed the petition for removal to the Federal Court on Oct. 2nd, 1905 and that said petition was addressed to and filed in the District Court of the State of Iowa, within and for Mahaska County, and the prayer was that the bond filed therewith be accepted by the State court; that an order be made that no further proceedings be had in the state court and that the action be removed to the Federal Court. (Rec. page 3). That said defendant (plaintiff in error) never called said petition up for a ruling until Oct 6th, 1910, when the same was argued and by the court over-ruled and on defendant's application the following order was made: "Defendant is given ten days to plead." (Rec. page 7).

On Oct. 15th, 1910 said Defendant filed its answer, pleading contributory nebligence, and the bar of the statute of Lilitations of the Iowa Code. (Rec. page 7).

On Dec. 6th, 1910, plaintiff filed an amendment to the petition to which said defendant filed an answer. (Rec. page 7).

On the 28th day of Feb. 1911 still recognizing the jurisdiction of the State Court, defendant filed a

motion to dismiss plaintiff's couse of action and to strike from the files all pleadings of the plaintiff filed since Sept. 1st, 1905, for the reason that the cause of action had been removed to the Federal Court. (Rec. page 11).

After a hearing on said motion on the 3rd day of March, 1911 (Rec. page 17) in which the defendant participated examining witnesses, making objections, and taking exceptions (Rec. pages 17 to 18) the court on March the 4th, 1911 entered the following order to wit:

> "Now on this day this cause came on for hearing on defendant's motion to dismiss and strike, and the court being fully advised in the premises, said motion of defendant to dismiss and strike is over-ruled and defendant excepts. IT iS CONCEDED BY ALL PARTIES THAT THIS CAUSE SHALL STAND FOR TRIAL ON SUB STITUTED PETITION FILED BY PLAINTIFF ON FEB. 20TH, 1911. Defendant is given till Monday, March 6th, 1911 to plead." (Rec. page 19).

One the 6th day of March, 1911, defendant filed its answer to the amended and substituted petition, pleading the statute of limitations. (Rec. page 20.

On March 6th, 1911, the cause came on for hearing before the court and jury and the following entry was made,

"IT IS AGREED THAT MARTIN LOCK-

ART (the decedent) WAS 68 YEARS OF AGE AT THE TIME OF HIS DEATH AND THAT HIS EXPECTANCY OF LIFE AS SHOWN BY THE CODE SUP. PAGE 316 WAS 8.753 YEARS." (Rec. page 21).

On March 11th, 1911 the jury returned a verdict for plaintiff and assessed his damages at $850.00 on which verdict judgment was rendered to which defendant excepted.

On March 13th, 1911 defendant filed a motion for a new trial and a motion in arrest of judgment. (Rec. pages 26 to 28).

On April 7th, 1911 the said motion for a new trial and in arrest of judgment was over-ruled and defendant excepted. (Rec. page 23).

From the judgment and rulings of the District Court the defendant appealed to the Iowa Supreme Court which resulted in an affirmance of the judgment of the lower court. (Rec. 29 et seq).

The situation of the plaintiff in error, in this state of the record comes well within the law as stated in Black's Dillon on Removal of Causes Sec. 15 as follows:

> "A party to a suit in a state court may, so far as concerns that particular litigation, waive his right to remove the same to the Federal Court. Parties may not go to trial on the merits, take their chances on the result, and afterwards ques-

tion the jurisdiction of the court on any ground which could be waived."
Lesh vs. Bailey 95 N. E. (Ind.) 341, 342.

JURISDICTION OF THE UNITED STATES SUPREME COURT.

The Supreme Court of the United States can not review the decision of the Supreme Court of a state where the decision is based on the construction of a state law, even though it may appear that a question involving rights under Federal statutes was made in the pleadings.

Cal. Nat. Bank vs. Thomas 171 U. S. 441 (43 L. Ed. 231).

Nor can the United States Supreme Court review a decision of the state court which involves merely the construction of a statute of a state and not its validity.

Orr vs. Gilman 183 U. S. 278 (46 L. Ed. 196).

Gulf N R. Co. vs. Hewes 183 U. S. 66 (46 L. Ed. 86).

Turner vs. The Wilke Co. 173 U. S. 461 (43 L. Ed. 768).

Costillo vs. McConico 168 U. S. 674 (42 L. Ed. 622).

Louisville Ry. Co. vs. Louisville 166 U. S. 709 (41 L. Ed. 1173).

Electric Co. vs. Dow 166 U. S. 489 (41 L. Ed. 1088).

DID THE UNITED STATES SUPREME COURT EVER ASSUME JURISDICTION?

The only evidence that the case was ever in the Circuit Court of the United States is that defendant filed a copy of the record in the office of the Clerk of the United States Court and the same was then indorsed. "filed March 29th, 1906. E. R. Mason, Clerk." Record page 13). It is further shown than on May 9th, 1906, Dec. 6th, 1906, May 29th, 1907, Dec. 5th, 1907 and on May 28th 1908, the said Court entered orders that the cause be "continued generally" and on Dec. 5th, 1908, the following order was entered:

> "This cause having this day been called and there being no response from either side, and the same having been pending in this court for more than three years without any action by either party except to have the same continued. It is now ordered than unless the same be noticed for trial at the next term of this court or good reason shown for not so doing that the same shall be dismissed for want of prosecution." (Rec. page 14 and 16).

That on May the 11th, 1909, the following order was made by the said Circuit Court:

> "This cause came on this day for hearing, the defendant appeared by John I. Dille and plaintiff not appearing the same was dismissed at plaintiff's costs for want of prosecution." (Rec. pages 16 and 17).

There is nothing in this record to show that the cause was ever removed, or that any order of the court assuming jurisdiction thereof had been made and there IS NOTHING IN THE RECORD TO SHOW THAT THE PLAINTIFF OR HIS ATTORNEYS EVER HAD NOTICE THAT THE SAID CAUSE WAS PENDING IN THE SAID CIRCUIT COURT OF THE UNITED STATES OR THAT THEY WOULD BE REQUIRED TO APPEAR THERE AND PROSECUTE THE SAME.

ARGUMENT.

Counsel for plaintiff in error at the very beginning of their argument make an admission that is vital in this case and renders it unnecessary for the defendant in error to do more than to show that such concession is based upon authority.

Referring to the determination of the Iowa Supreme Court that the amount in controversy in this case was less than $2,000.00 counsel say:

> "The opinion was based upon an interpretation of the statutes of Iowa and as a matter of statutory construction would undoubtedly be binding upon the United States Courts." (See Brief and Argument of Plaintiff in Error, page 17).

And on page 18 of their argument they say:

> "It may therefore be conceded that in view of the opinion of the Supreme Court of Iowa as this case stood when commenced in the District Court of Mahaska County, the amount involved was less than $2,000.00."

This was a determination made by the District Court of Mahaska County based upon the petition of Plaintiff (defendant in error) and the statutes of Iowa applicable thereto, and was made when the defendant's (plaintiff in error) application for removal was first called to its attention and at the first time it had any knowledge of or opportunity to pass upon this question. This decision was affirmed by the Supreme Court of Iowa and counsel for Plaintiff in Error concedes that it was right and that the amount in controversy, under the statutes of Iowa, as construed by the highest authority in the state at the very time they claim to have removed this cause to the Federal Court, was only $1,990.00, and hence THE CASE WAS NOT REMOVABLE.

Yet they now ask this court to hold that by "a sort of judicial larceny" furtively and by means of a false affidavit as to the amount in controversy as shown by the petition, they stole this case away from the State Court and removed it to the Federal Court and that their action in so doing was legal; that in this way they lawfully removed a case that was not removable and stole jurisdiction away from the only

court that had jurisdiction and conferred it upon a court that had none and could have none, and did it without the knowledge of the State court or the attorneys for the plaintiff. Upon the face of the plaintiff's (defendant in error) petition the state court had jurisdiction. Having Jurisdiction it was not only its right but its duty to retain that jurisdiction and adjudicate the issues made by the pleadings. Plaintiff in Error could not deprive the state court of jurisdiction and remove the cause to the Federal Court by filing an affidavit that contradicted the record as to the amount involved for the reason that the amount involved is determined by the record. To hold that they could do so would make every case removable and the limitation of $2,000.00 fixed by the United States statutes wholly inoperative. The State court never lost jurisdiction because at the first opportunity it had to pass upon the question, it denied the application for removal and proceeded to try the cause. The United States Court never had jurisdiction because the amount involved was less than $2,000.00. It never assumed to have jurisdiction because it never passed upon that question and never tried the cause upon its merits. Plaintiff in Error refused to rely upon its claim of secret removal but preferred to take its chances upon a trial in the State court upon the merits. Having done so it waived not only its claim of having removed the

same but also any right of removal and must now abide the consequences. The right of removal in this cause, if there is any, depends upon the amount in controversy. The amount in controversy depends upon the proper construction to be placed upon an Iowa statute.

The Mahaska County District Court, where the cause was commenced, construed that statute in favor of its own jurisdiction.

This decision was affirmed by the Supreme Court of the State upon appeal. That decision and construction are binding upon the United States Court and Plaintiff in Error so concedes in his argument.

In conclusion therefore we present the following propositions as absolutely conclusive:

1st.—That the amount in controversy is less than $2,000.00.

2nd.—That the cause was not removable under the Federal Statutes.

3rd.—That the United States Circuit Court could not legally have obtained jurisdiction of the case.

4th.—That said Circuit Court never assumed jurisdiction of the case, never decided that question or determined the merits.

5th.—That the Mahaska County District Court

never relinquished its jurisdiction to try and determine the case.

6th.—That the said District Court never in any way recognized any assumption of jurisdiction on the part of the Federal Court.

7th.—That the State District and Supreme Courts did assert jurisdiction and did try and determine the case upon its merits.

8th.—That Plaintiff in error through its counsel appeared in the State Courts and followed the cause through the state Supreme Court and recognized at all times the jurisdiction of the state counts in the adjudication of the cause.

9th.—That Plaintiff in Error specifically conceded the jurisdiction of the state court and waived its right to removal, if it had any, and waived the alleged fact of removal by the concession shown on pages 19 and 21 of the record filed in this cause.

There is therefore no error in the Iowa Supreme Court and the writ should be dismissed with costs.

Respectfully submitted,

E. Elmer Mitchell Solicitor United States Court.
L. T. Shangle,
D. C. Waggoner, and
John McCoy of Counsel.